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AUTHOR Levis, William; And Others
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ABSTRACT

The Colorado Advisory Committee to the U.S. Commission on Civil Rights investigated the accessibility of the legal profession to minorities and women in Colorado and the difficulties encountered by minorities and women at the professional education level and in the bar examination. Local and national statistics were provided by the American Bar Association and other organizations related to the legal profession. Law school professors, minority and women law school students and attorneys, State Supreme Court judges, and other interested persons were interviewed. Information was also collected from the University of Colorado School of Law and the University of Denver College of Law. Testimony on the subject was heard at an open, public meeting on May 10, 1975. Findings included: despite recruitment efforts the lack of minority and female faculty and administrators was a serious problem at both law schools; minority and female students voiced strong complaints that negative attitudes based on race and sex manifested by some professors at both law schools were damaging to student performance; the financial aid available to minority students in law school was less than adequate and a severe handicap in some cases; and the bar examination in Colorado had a disparate and, therefore, discriminatory effect on minority applicants. (NQ)

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Legal Profession in Colorado by Minorities and Women

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June 1976

ACCESS TO THE LEGAL PROFESSION

IN COLORADO

BY MINORITIES AND WOMEN

--A report prepared by the
Colorado Advisory Committee to the
U.S. Commission on Civil Rights

ATTRIBUTION:

The findings and recommendations contained in this report are those of the Colorado Advisory Committee to the United States Commission on Civil Rights and, as such, are not attributable to the Commission.

This report has been prepared by the State Advisory Committee for submission to the Commission, and will be considered by the Commission in formulating its recommendations to the President and the Congress.

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COLORADO ADVISORY COMMITTEE TO THE
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June 1976

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Sirs and Madam:

The Colorado Advisory Committee, pursuant to its responsibility to advise the Commission concerning civil rights problems in this State, submits this report on the accessibility of the legal profession in Colorado to minorities and women. Through its investigation the Advisory Committee concludes that although progress has been made, there are significant obstacles in the primary and secondary educational system, in the law schools, and in the bar examination, which militate against Colorado minorities and women becoming licensed attorneys.

Utilizing statistical data and interviews with students, faculty, and persons from the Colorado Supreme Court as well as from other agencies associated with the legal profession, the Advisory Committee examined difficulties encountered by minorities and women at the professional education level and in the bar examination. The following are among the more important findings resulting from the study:

-- Despite recruitment efforts the lack of minority and female faculty members and administrators is a serious problem at the Universities of Colorado (C.U.) and Denver (D.U.) Law Schools.

-- The 1974 memorandum from Peter H. Holmes, director of DHEW's Office for Civil Rights, is misleading in that it conveys the impression that affirmative action will lead to selection of "less qualified" women and minorities.

-- Negative attitudes based on race and sex manifested by some faculty members at both C.U. and D.U. Law Schools are damaging to student performance.

-- The amount of financial aid available to minority students in law school is less than adequate and a severe handicap in some cases.

Recommendations which seek to improve mechanisms needed to change the present situation are addressed to State and Federal agencies. They concern such areas as affirmative action programs, grievance procedures, course requirements, financial aid, the bar examination, and standardized testing procedures.

We urge you to endorse these recommendations. At the Federal level we ask you to press the U.S. Department of Health, Education, and Welfare to revise the "Holmes memorandum" so that enforcement of civil rights statutes and Executive orders in institutions of higher education will conform to guidelines in the Department of Labor's Revised Order No. 4. The Advisory Committee also asks that the Commission undertake a study to evaluate standardized tests formulated by the Educational Testing Service, including the Law School Admission Test, in order to determine possible cultural bias.

Respectfully,

/s/

GAY E. BEATTIE
Chairperson

ACKNOWLEDGMENTS

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The investigation and report were the principal staff assignment of William Levis, with writing and review assistance from Grace Buckley, William Muldrow, and Rebecca Marrujo, and support from Esther Johnson and Phyllis Santangelo. The project was undertaken under the overall supervision of Dr. Shirley Hill Witt, director, Mountain States Regional Office.

Final production of the report was the responsibility of Cheryl Banks, Vivian Hauser, and Vivian Washington, supervised by Bobby Wortman, in the Commission's Publications Support Center, Office of Management.

Preparation of all State Advisory Committee reports is supervised by Isaiah T. Creswell, Jr., Assistant Staff Director for Field Operations.

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CONTENTS

I. INTRODUCTION 1

II. ACCESS TO THE LEGAL PROFESSION IN COLORADO 7

Background 7
- Affirmative Action in Admissions
- Obstacles
- Entrance Requirements

Recruitment and Admission. 23
- University of Colorado School of Law
- University of Denver College of Law

Student Organizations. 34
- Minority Student Organizations
- Women's Law Caucus

Faculty. 36
- Affirmative Action Programs

Post-Law School Access 44
- The Bar Examination Nationwide
- The Colorado Bar Examination

III. FINDINGS AND RECOMMENDATIONS 71

APPENDIX. 80

I. INTRODUCTION

Underrepresentation of minorities and women in the legal profession prompted the Colorado Advisory Committee to the U.S. Commission on Civil Rights to investigate barriers to that profession in the State. Obstacles working against minorities and women who wish to enter the legal profession arise from a complex of social, cultural, and educational factors. Perhaps the most difficult barrier confronting minorities is the primary and secondary educational system. This institution through discriminatory teaching and unequal education dictates how many of them will fail to graduate from high school, thus preventing them from going on to college and professional schools.

Numerous studies have shown that no other public institution exerts as much influence over a person's life as the public educational system. Early and subsequent success or failure within school dictates the amount of education one attempts to master. If the students are minorities, their probability of experiencing early failure within the educational system is greater than it is for nonminority students. For example, a U.S. Commission on Civil Rights study entitled The Unfinished Education[1] shows that for every 10 Mexican American students entering first grade only 6 will graduate from high school. The educational system fails to graduate 40 percent of all Mexican American students nationally, and in Denver the median educational level for Mexican Americans in 1970 was 10.2 grades, compared to 12.1 for whites. Statistics provided by the Census Bureau show that, despite recent reported gains, the educational system does only slightly better with educating blacks, whose median educational level is 10.0 nationally and 12.0 in Colorado.

Minority students spend 6 hours each weekday until they are at least 16 years old in a school environment which may not be conducive to learning if any of the following conditions prevail in their school: lower teacher expectations for minority students compared to white students; exclusionary curricula which do not recognize or teach about the positive aspects of minority students' cultural backgrounds; and negative teacher and counselor attitudes, which during classroom interaction convey that minorities

are intellectually inferior to whites and belong in vocational as opposed to professional careers. Given the above conditions, which the U.S. Commission on Civil Rights has shown still exist in many schools, it is no wonder that many minorities do not graduate from high school or enter college.

The problems which have traditionally excluded women from the legal profession are substantially different from those of minorities. Women generally excel within the educational system, doing much better than their male peers in some subjects such as literature. As a group they have been socialized by their families, churches, and other institutions to be quiet and to achieve academically. The educational system also acts as a socialization agent and in so doing transmits many cultural and social attitudes which limit the career aspirations of young women students. The damaging values transmitted are generally those that stereotype women as being passive as opposed to assertive and therefore not emotionally suited for the legal profession. They are encouraged and counseled into entering traditional women's fields such as nursing, teaching, and social work but rarely law. Some teachers may have internalized these stereotyped images of women in our society and concluded that their female students are not bright enough, logical enough, or assertive enough to pursue a career in law. The above is only one example of many complex social and cultural factors which operate to discourage women from becoming lawyers. There are few in the legal profession because they are counseled away from that field.

In the mid-1960s, institutions of higher learning began to realize that minorities and women had to overcome a myriad of cultural and social obstacles to obtain equal educational achievement. Administrators and faculty attempted to alleviate the problem at the higher educational level through affirmative action programs in the admission of minorities at the undergraduate, graduate, and professional school levels. Within the legal profession, organizations like the American Bar Association and the Association of American Law Schools encouraged the development of such programs in law schools.

The term "affirmative action" has meant different things to different people. In the area of higher education, Marco DeFunis challenged the University of Washington's affirmative action program for law school

because he was not admitted although minority students with lower undergraduate grade point averages (UGPA) and lower Law School Admission Test scores (LSAT) were admitted. DeFunis was allowed to attend law school while his lawsuit was litigated. In the spring of 1974, the U.S. Supreme Court dismissed the DeFunis suit, stating that it was moot because he was about to graduate from law school.[2] A similar lawsuit, the Bakke case, is presently being litigated in California.[3] Bakke charged that the University of California-Davis Medical School's Task Force program, which admits minority students, is unconstitutional. The lower court upheld Bakke in his contention that the program itself was unconstitutional and violated the equal protection clause of the 14th amendment. The university has appealed the ruling, but the final decision on the issue may be years away.

The DeFunis case is moot, but the issue of how to alleviate the effects of unequal educational opportunities for minorities and women is not. Most law schools throughout the nation still have affirmative action programs in admissions for minorities. Generally, programs throughout the nation recognize that they may admit some minorities who have lower UGPAs and LSAT scores than their competitors but are nonetheless qualified. In fact, the Association of American Law Schools comments that minority applicants who are admitted to law schools are qualified for success in law school without remedial work. It notes that, at the University of Washington Law School, 17 of the minorities admitted when DeFunis was not held roughly as high or higher quantitative credentials than DeFunis. The other 20 minority applicants who were admitted had lower quantitative credentials than DeFunis but were still qualified.

In spite of recent gains made by minorities and women in higher education, they still are underrepresented in law schools. A study entitled Professional Women and Minorities shows that in 1970 the total minority student population in U.S. law schools was 3,609 (5.8 percent), compared to 58,550 (94.2 percent) for the nonminority population. There were 687 (1.1 percent) Spanish-surnamed students, 277 (0.4 percent) Asian Americans, 2,454 (3.9 percent) blacks, and 192 (0.3 percent) Native Americans.[4] These figures are especially dismal considering that minorities constituted approximately 16 percent of the population of the United States. Although national figures for minority women are

not available, the following examples from Colorado indicate that they are even less represented in the law schools and legal profession.

In 1970, although women accounted for 51 percent of the United States population, they were only 12.5 percent of students in law school.[5] In 1970, 5 percent of Colorado lawyers were women.[6] Minorities constituted 4 percent of all lawyers in the State, and minority women were only 0.14 percent.[7]

Within Colorado, the Universities of Colorado (C.U.) and Denver (D.U.) Law Schools were among the first in the nation to initiate affirmative action admissions programs for minorities. They have managed to double their enrollment of minorities and women over the past 10 years. C.U. Law School has done especially well. In addition to a Special Academic Assistance Program, approximately 15 percent of each entering class is composed of minority students. This admission rate compares favorably with the minority representation in Colorado's population, which is approximately 16 percent. This record surpasses that of many law schools throughout the United States. Women comprised 25 percent of the last few entering classes at the C.U. Law School. D.U. Law School has increased its minority enrollment to approximately 9 percent and that of women to about 35 percent of the last entering class.

Despite these good efforts by law schools, barriers which work to exclude minorities and women from the legal profession still persist. The problems that result in the underrepresentation of minorities and women in the legal profession do not begin or end with the law schools. Law school is but one portion of a lengthy educational and testing process which culminates in admission to law practice. The last steps in the process include law school and passage of the bar examination.

The person who decides on law as a profession has already completed nearly 16 years of education before applying for admission to law school. For most minority students, that educational experience most likely has been inadequate, discriminatory, and has left them ill-prepared for law school. For women, the educational process may have exerted pressure to divert them into other areas of study so that their decision to become lawyers requires high motivation and persistence on their part.

Successful completion of law school does not guarantee admission to the bar in Colorado. Only 65-75 percent of the applicants for each of the two annual bar examinations in Colorado pass and successfully enter into practice.

This report has been prepared by the Colorado Advisory Committee for submission to the Commission and will be considered by the Commission in formulating recommendations to the President and Congress. The report is the result of an investigation by the Colorado Advisory Committee into access to the legal profession by minorities and women in Colorado. The field investigation included gathering local and national statistics, provided by the American Bar Association and similar organizations related to the legal profession. The Committee and Mountain States Regional Office staff interviewed law school professors, minority and women law school students, minority and women attorneys, Colorado Supreme Court judges, and other interested persons.[8] The Committee and Mountain States Regional Office staff also collected information from the institutions and heard testimony on the subject at an open, public meeting on May 10, 1975.[9]

NOTES TO CHAPTER I

1. U.S., Commission on Civil Rights, The Unfinished Education (October 1971).

2. DeFunis v. Odegaard, 416 U.S. 321 (1974).

3. Bakke v. Regents of University of California, California Superior Court for Yolo County, No. 31287 (Judgment, March 1975).

4. Eleanor L. Babco and Betty M. Vetter, Professional Women and Minorities (Washington, D.C.: Scientific Manpower Commission, May 1975), p. 36.

5. Ibid., p. 89.

6. U.S., Bureau of the Census, Detailed Characteristics--Colorado, PC(1)-D7, Table 171.

7. Ibid., Table 739.

8. Specific comments by the Colorado Supreme Court have been incorporated into this report. The Colorado Supreme Court does not necessarily agree with the content of this report or the findings and recommendations.

9. Responses by C.U. and D.U. Law School officials have been incorporated in this report wherever their comments addressed specific issues, pages, quotations, and/or other material. C.U. and D.U. Law School officials do not necessarily agree with the content of this report or the Advisory Committee's findings and recommendations.

II. ACCESS TO THE LEGAL PROFESSION IN COLORADO

A. Background

1. Affirmative Action in Admissions

Law schools in the United States rely primarily on the undergraduate grade point average (UGPA) and the Law School Admission Test (LSAT) when making admissions decisions. In addition to these quantitative factors which are traditionally used by schools in admissions decisions, other factors are considered such as: appraisals of the applicant by prior teachers, extracurricular activities, work or military experience, the undergraduate college of the applicant, and the alumni status of the applicant or his or her family. In the past minority status operated as an exlusionary factor in admissions decisions in some schools.[1] Since the mid-1960s, however, minority status has been a factor which may have been given preferential consideration to some degree by most law schools.

The Association of American Law Schools (AALS), Council on Legal Educational Opportunities (CLEO), American Bar Association (ABA), and Law School Admissions Council (LSAC) all support and justify minority admissions programs. The AALS takes the position that:

> Effective access to legal representation not only must exist in fact, it must also be perceived by the minority law consumer as existent so that recourse to law for the redress of grievance and the settlement of disputes becomes a realistic alternative to him.[2]

The association also asserts:

> The creation of such an opportunity by admission to law school of applicants selected in part by race reaches the status of a compelling state interest in the training of an adequate number of minority lawyers and would justify even the imposition of a quota system.[3]

The ABA states that:

> Affirmative action programs are valid where they are used to redress the negative results of past racial discrimination and to correct present racial imbalance.

According to the ABA, "there exists...a legacy of past governmental and societal discriminatory practices establishing a compelling need for affirmative action." Such practices include failure to prepare minority students for law school, failure to provide a sound legal education, and failure to provide equal access to job opportunities.[5] The ABA in 1967 recognized that:

> the shortage of minority attorneys, resulting in the shortage of minority prosecutors, judges, public officials, governors, legislators, and the like, constitutes an undeniable compelling state interest. If minorities are to live within the rule of law, they must enjoy equal representation within the legal system.[6]

The first minority admissions programs in the country were instituted in 1966 at Harvard University, Cambridge, Mass., and Emory University, Atlanta, Ga. The Ford Foundation sponsored such a program at the University of Denver College of Law the following year. Both the Universities of Denver and Colorado inaugurated minority programs in 1967. Three years later more than 79 of the 147 ABA-accredited law schools had developed special admission programs for minorities.

Because few minority students have been able to gain admission to law schools under traditional criteria, the ABA, AALS, La Raza National Lawyers Association, LSAC, and the National Bar Association (a primarily black organization) created the Council on Legal Educational Opportunities. CLEO provides "economically disadvantaged students...an opportunity to attend an accredited law school and ultimately to enter the legal profession."[7] The lack of minorities and women in law school is reflected by their numbers in the legal profession, where national statistics indicate that in 1960 approximately 1 percent of lawyers in the United States were minority and 2.3 percent were women. At several accredited law schools CLEO conducts a summer institute prior to the first year of law school, which allows students to determine their ability to study law and to become accustomed to the process.[8]

CLEO has said that affirmative action programs should only be instituted as long as they can be justified by underrepresentation of minorities; however, present statistics indicate a continuing need for such programs. According to CLEO officials, "Recent surveys reveal that scarcely 1 percent of the bar of the United States is black and that even greater inequities exist for other minority groups such as Mexican Americans, Puerto Ricans, and American Indians."[9]

National statistics provided by the American Bar Association indicate substantial increases in the numbers of minorities and women attending law schools since the advent of affirmative action programs. ABA statistics do not treat minority women as a separate category. Minority women are counted in both the minority and female categories. In the fall of 1969, 68,386 persons attended law school. Of those, 4,715 (6.9 percent) were women, 2,128 (3.1 percent) were black, 548 (0.8 percent) were Spanish surnamed and 72 (0.1 percent) were Native American.[10] In contrast, in the fall of 1974, of the 110,713 persons enrolled in the nation's accredited law schools, 21,788 (19.7 percent) were female, 4,995 (4.5 percent) were black, 2,007 (1.8 percent) were Spanish surnamed and 265 (0.2 percent) were Native American.

These increases are remarkable considering that the Law School Admission Council indicates that standards for admission have been raised by law schools in the last 5 years due to the large increases in applicants. Minority students who are admitted under special programs today would have been admitted at the top of the entering class 5 years ago. Still, "...most accredited law schools attempt to select students on the basis of predictions indicating not only that they will get good grades in law school but also make significant contributions (both) to law school classes and to the community at large."[11] According to Harvard Professor Archibald Cox, "...all students are best served by selecting from the qualified applicants an entering class whose members have the most diverse social, economic, and cultural backgrounds and the widest variety of talents and interest."[12]

2. Obstacles

a. Educational Preparation

Prior to 1967, the number of minority group persons and white women applying for admission to, and attending, law schools was small. CLEO comments on the situation with the observation that bar membership figures have remained remarkably constant despite the formal elimination of racial discrimination by all law schools. It notes that the causes of the lack of minority students lie deeper and suggests that rigid and unbending application of quantitative admissions criteria, such as the LSAT scores and UGPAs, would continue to exclude the bulk of qualified minority applicants.[13]

A primary obstacle has been the type of education almost all minority students receive prior to application to law school. They suffer a diversity of educational handicaps. Among the most commonly cited are a lower level of language skills, a tendency to perform lower than their white counterparts on tests, and inadequate study skills. Specifically, the handicaps can be traced back to the poor quality of teaching which minority students receive; an irrelevant, outdated, or vocational curriculum as opposed to a college preparatory curriculum in high school; and a lack of adequate, sympathetic teachers and counselors and other professional role models throughout their school years. The American Bar Association comments:

> Early childhood deprivation and the lack of adequate preparational education in the primary and secondary school systems have made it impossible for a large number of otherwise qualified minority students to have the opportunity to qualify for law school admission on a competitive basis.[14]

Unfortunately, the educational process which adversely affects the performance of minority students begins the day they enter elementary school. Minority students frequently must remain in an inferior school and endure the resultant educational disadvantages. Author Jonathan Kozol emotionally depicts the situation of many minority students in his book, Death at an Early Age: "One of the saddest things on earth is the sight of a young person already becoming adolescent, who has lost about five years in the chaos and oblivion of a school system and who still not only wants to but plans to learn."[15] Although Mr. Kozol's book deals specifically with unequal education in Boston, Mass., as it affects black students, the same situation presently

exists for other minority groups, including Mexican Americans, Native Americans, and Asian Americans.[16]

Some educators assert that negative teacher attitudes regarding the intellectual abilities of minority students seriously hinder the students' attempts to perform at their highest potential. Studies are abundant and educators are aware that "student performance correlates with teacher expectations. This means that if the teacher sees the student as inferior, etc., the teacher makes the student inferior."[17] Indeed many minority students may become victims of a self-fulfilling prophecy.[18] In predominantly minority schools, teachers' comments similar to the following exemplify negative attitudes and lower expectations of some teachers. "I am a good teacher, I think. If I had a normal bunch of kids, I could teach. But this certainly is not a normal buch of kids," or "You just can't hold these students to high standards, they just can't make it."[19]

Equally damaging is teacher reluctance to allow minority students to perform at all. A U.S. Civil Rights Commission study found that teachers gave praise or encouragement to Anglo students 36 percent more often than to Mexican Americans.[20] They directed questions to Anglos 21 percent more frequently than to Mexican Americans and accepted and used the ideas and responses of Anglo students 40 percent more often than those of Mexican Americans. Commission staff observed that:

> In a Phoenix classroom, several Chicanos kept raising their hands eagerly at every question. Mrs. G. repeatedly looked over their heads and called on some of the same Anglo students over and over. In some cases, she called on Chicanos only because Anglos were not raising their hands. After a while the Mexican Americans stopped raising their hands.[21]

Although these examples deal with Mexican Americans, other minority groups face similar problems.

Unfortunately, the poor quality of discriminatory teaching may continue throughout primary and secondary school. By the time minority students enter college they must "catch up" to their white counterparts. By the time many minority students reach law school, they may find tha

their white counterparts are substantially ahead in terms of verbal and language abilities. In the alternative, minority law students may overestimate their nonminority competitors and underestimate their own abilities because they realize that the learning gap may be wider at each competitive stage. One black educator states, "When I entered law school I doubted my competence to compete. When I graduated, I was certain of my competence to compete."[22]

The high school curriculum in predominantly minority schools often does not provide an opportunity for minority students to prepare themselves adequately for college and subsequently law school. They may not have the option of enrolling in college preparatory classes which emphasize the development of good verbal and language skills. Many teachers and counselors encourage minority students to enroll in vocational classes as opposed to college preparatory classes on the assumption that they cannot compete at the college level.[23]

The importance of college preparatory courses for minority students cannot be overestimated. It is in such courses that they test their potential for professional careers. If they do not have such an opportunity, they may assume that they are only suited for vocational occupations. Further, it is within college preparatory classes in high school that many of the foundations of learning are established in analytical techniques and written and verbal communications skills. Unless the foundation for good language skills is developed early in high school and perfected in undergraduate work, the minority student may have difficulty in law school, where students are responsible for producing extensive written analytical material.[24]

When minority students enter college, their efforts to catch up with majority students may be frustrated by poor performance on exams. Law professors generally agree that, when compared to nonminority students, minority students perform less well on tests. Some believe that this is a manifestation of the development of inadequate study methods. A black law professor notes:

> The black student's study habits probably will be less refined, and he will not have been shown the techniques of studying law. (For instance, I had

to urge one black student to mark up the cases in his book; he said he had always been taught never to mark in a book.)[25]

This example is illustrative of the types of study habits some minority students have when they enter law school.

b. **Role Models**

Two white females, D.U. Law School students, comment "Law school is a man's world (and)...the most difficult period for any law student is the first year. The lack of identifiable role models at law school makes this transition period particularly difficult for women."[26] Their comments exemplify minority and women concerns about the lack of minorities and women within the legal profession and law school.

A role model is defined as an individual whose behavior in a particular role provides a pattern or model upon which other individuals base their behavior in performing the same role.[27] Role models can serve to enhance positive feelings about self and strengthen identity and sense of belonging. Likewise, the absence of role models may reinforce negative feelings of self-doubt, if existent, and lack of confidence. While the existence of visible role models is not essential to success in any given profession, minority and women students interviewed by the Commission staff expressed the belief that their adjustment to the demands of law school and the legal profession would be facilitated if there were more minority and women law professors. For instance, Charles Casteel, a black law student at C.U., commented at the Colorado Advisory Committee's informal hearing that black law students have strong feelings of isolation due, in part, to the lack of minority professors in the law school and minority administrators in the legal aid clinic. (p. 219)[28]

c. **Financial Aid**

Another problem minority students encounter while attending law school is the lack of adequate financial aid. Most minority students attending law school at C.U. and D.U. receive some type of financial assistance. The amount of assistance varies depending upon the financial need of the student.[29] Minority students and professors agreed that C.U. law school does an excellent job of providing individual

students with an adequate amount of financial aid. The maximum amount for an academic year available to students attending C.U. law school is $2,400 for a single resident student and $4,600 for a married resident student.[30] This amount provides enough money to pay for tuition, fees, and books, plus a small monthly allowance, which is enough for essentials of housing and food. If any unanticipated expenses occur, students on financial aid generally cannot borrow from family members or rely on a savings account. The problem of meeting unanticipated expenses is more serious for lower-income students who have fewer available financial resources. Many lower-income students on financial aid are minorities. Therefore, they may jeopardize academic achievement because of the necessity to work part time. If the unanticipated expense is high, they may be forced to work full time and subsequently drop out of law school.

Because of the high cost of tuition at D.U. Law School, the problems encountered by minority students on financial aid differ substantially from those at C.U. Law School. The maximum amount of financial assistance available at D.U. Law School is a full tuition waiver, which amounts to $3,150 per academic year or $1,050 per quarter.[31] Oftentimes, the amount of financial aid granted is not sufficient to pay full tuition, but merely one-half or one-third of the tuition costs. Many minority students attending D.U. Law School are forced to work either part time or full time. Ernest Jones, a D.U. law student, stated that the necessity of working full time has forced some students to drop out of law school. Other minority students interviewed said that the lack of adequate financial assistance makes it more difficult for them to complete law school.[32]

3. Entrance Requirements

Law schools in the United States rely primarily on two standards for making decisions regarding the admission of a student into their programs. The first is the student's undergraduate grade point average, and the second is the student's scores on the Law School Admission Test. Schools attempt to use these figures to predict an applicant's success in law school. Dr. Frederick M. Hart, president of Law School Admissions Council and dean of New Mexico School of Law, cautions admissions committees to be "suspicious of traditional predictors of success for minority applicants because of the strong possibility of cultural bias."[33] Also

applicable is an underlying rationale of Griggs v. Duke Power Co. (a Supreme Court decision) that whenever a test--or an admissions process--is operating in a manner that prevents minorities from gaining access to a job or profession, the process is suspect and should be carefully studied, and any unconstitutionally discriminatory bias should be eliminated.[34]

a. Law School Admission Test (LSAT)

The LSAT was created in 1947 by a group of several law schools. It is owned by the Law School Admission Council and administered by the Educational Testing Service (ETS). The LSAT has been subjected to numerous validity studies and has been revised five times since its inception.[35] It is presently undergoing another revision. The test is scored on a scale of from 200 to 800. During the years it has been administered, the mean score for all takers has been 520.

Three different aspects of the LSAT are used for admission purposes: individual total scores; scores on the writing ability, which are reported separately from the general LSAT score; and the "LCM," the mean LSAT score received by all applicants from a particular college over a specified period of time.

Recent surveys indicate that minority applicants score lower on the LSAT than whites. A 1972 study which analyzed LSAT scores for black and Chicano candidates found that both minority groups had significantly lower scores than whites on both the LSAT and on writing ability.[36]

A 1973 study analyzed the performance of black law students in predominantly white law schools. Using a prediction equation based on LSAT scores, the study found that black students as a group achieve first-year grades below those predicted by the LSAT, while white students generally achieve slightly better grades than predicted.[37] During the 1960s and 1970s the Law School Admission Council began supporting cultural validity studies of LSAT. Two early studies, 1968 and 1972, concluded that the LSAT scores have the same predictive value for minorities that they do for majority students.[38] A 1974 study by the same authors reports essentially the same conclusion for both black and Chicano law candidates. While individual indicators (LSAT, Writing Ability, UPGA) appear to predict equally well for minorities and whites within their own groups, minority

students tend to earn lower grades than predicted, while whites earn higher grades than predicted.[39]

If as one author points out, the LSAT scores are influenced by an individual's background and educational experience, one would expect different average LSAT scores for groups (emphasis added) of persons with different backgrounds and experiences. He states, "it would thus be surprising if, in this society of unequal opportunity, minorities did not show a lower mean score on the LSAT than non-minorities."[40] The studies cited consistently found that minorities tend to score lower on the LSAT. However, their lower scores can be manifestations of culturally biased testing and/or unequal educational opportunities and subsequently unequal educational achievement.

The trend in admission committees of law schools has been to admit students within the highest range of LSAT scores. Dr. Hart argues that this trend and the generally higher scores of white applicants, combined with an increasing number of applicants, may place minority applicants at a disadvantage in the admission process. He states:

> Suppose a law school with room for 200 students in its entering class receives 300 applications. Suppose further that about 10 percent of the applicants are from minority races and that on the basis of academic predictors these 30 applicants are evenly distributed among the pool. On the basis of usual admissions factors (excluding race) the school determines that 2/3 of the applicants are qualified, in the sense of having a better than even chance of succeeding at law study. Two hundred applicants then will be admitted, and the class will contain 20 minority students. This means that when minority applicants are evenly distributed in the applicant population, and when all qualified applicants are admitted, the same percentage of minority applicants will be in the class as were in the applicant population (10%). This we would regard as an ideal situation, and one in which the race of an applicant would not have any special relevance in the admissions decision.

> Now, to make the hypothetical more realistic, suppose the following year the school receives 3,000 applications instead of 300. Further, suppose that the number of minority applicants has not grown at the same rate so that there are only 60 minority applicants (2%) evenly distributed in the total applicant population. On precisely the same standards used the prior year, the school determines that 2/3 of the applicants are qualified students (including the 40 minority qualified students). Given the present trend to admit students with the highest LSAT scores...this school will select approximately one out of ten applicants, producing a class of 196 nonminority students and 4 minority students. While the number of minority applicants has doubled and their qualifications have not changed, yet the class has a minority component of only 2% rather than 10%.[41]

On the other hand, the law school can consider the LSAT score as only one factor among others, such as motivation and UGPA, when determining admissions decision.

There has also been a study comparing performance of the LSAT and other predictors in relation to the first-year grades of female students. A June 1974 study done for the Law School Admission Council found that women earned a higher mean average the first year at five of the eight law schools surveyed than did men; however, the female LSAT mean was lower than that of men at seven of the schools. Women had consistently higher mean scores on UGPA and Writing Ability at all eight schools.[42]

The percentage of minority women attending law school is extremely low at present.[43] Because of their low numbers it is impossible to draw conclusions on their LSAT scores or law school performance.

b. **Undergraduate Grade Point Average (UGPA)**

Generally minority students have a lower UGPA when admitted to law schools. C.U., for example, reports the following UGPA's for nonminority and minority students admitted through the Special Academic Assistance Program:[44]

Year	Nonminority Students	Minority Students
1974	3.51	2.87
1973	3.47	2.76

D.U. College of Law reports the following UGPA for all students (including Minority Admissions Program (MAP) students) and minority students admitted through regular admissions standards.

Year	All Students	MAP Students
1974	3.38	3.10
1973	3.31	2.91

The UGPA of minority students is another predictor which can be a manifestation of unequal educational opportunity and culturally biased testing within undergraduate schools. Dr. Hart argues that "an applicant's UGPA is normally a better indicator of law school performance than is the LSAT, and if a school had to choose to use only one predictor it should choose the UGPA." One obvious deficiency, he adds, is that there is no uniformity among undergraduate college grading systems and that, although the UGPA may be an indicator of academic promise, it may not measure the motivation to succeed in law school for the minority student. He concludes that, since minorities have to overcome a greater number of educational obstacles, when the UGPA is applied to the admission of minority students, it may be an indicator of a higher degree of motivation and evidence a greater amount of effort than that of nonminority students. He adds that a high degree of both motivation and effort are necessary factors contributing to success in law school.[45]

B. Recruitment and Admissions

1. University of Colorado School of Law

a. Entrance Requirements

The C.U. School of Law Bulletin states:

> Admission standards are based heavily on undergraduate grade point average and the Law School Admission Test score. The Admissions Committee may also take into consideration other factors such as trend in transcript, character and difficulty of the applicant's academic program,

letters of recommendation, and significant experience of the applicant.

The law school has further stated that:

> Because of the large number of highly qualified applicants for regular admission, the standards have been set at a high level, particularly for non-residents. For the Fall 1973 entering class, the average grade point average was 3.47 on a 4.0 scale and the average Law School Admission Test score was 638. For admission in Fall 1975 higher qualifications may be required, depending upon the number of applications received and completed and upon the credentials of the applicants.[46]

C.U. Law School is in the same position as other law schools in finding that applicants have higher qualifications each year. The law school has been admitting an average of 150 students per year since 1968. An average of 14 percent of those have been minority. Since 1968 only 24 minorities have been admitted under competitive admission standards.[47] The rest have been admitted through the Special Academic Assistance Program (SAAP), which will be explained in the following section.

Since 1966 C.U. Law School has admitted an average of 22 women per year.[48] The lowest number of women admitted was 7 (5 percent) in 1969, out of a total of 136 students, and the highest number admitted was 44 (25 percent) out of a total of 175 students in 1974. Nonminority women without exception have been admitted under competitive admissions criteria. Minority women have been admitted under the SAAP.

b. Special Academic Assistance Program

In 1967, "recognizing the need for increasing the number of minority group lawyers," C.U. Law School faculty established a Special Academic Assistance Program (SAAP), which admitted minority college graduates "whose credentials by usual standards may be somewhat below those ordinarily required for admission." The program includes a special free 8-week summer program immediately preceding the first year of law school and additional academic assistance during the first year if needed.[49] Its main objective, according to the law school bulletin, is to enable culturally different students to study and take exams on equal terms with

classmates. The program also offers financial assistance through cash grants, student loans, and work-study awards. Two student organizations, the Black American Law Students Association (BALSA) and the Chicano Law Students Association (CLSA), have assisted the faculty admissions committee with SAAP by furnishing information and advice bearing on minority applicants' probable success in law school.

Faculty at C.U. Law School voluntarily initiated the first SAAP. Many present faculty members taught summer courses without monetary compensation for the first 3 years of SAAP at a time when there was no funding for summer instructional costs. Further, many of the faculty volunteered their time to tutor minority students during the academic year.

The SAAP presently consists of two substantive courses offered in the summer. Students receive two credit hours in legal methods and three credit hours in contracts. Instruction is provided by two members of the law school faculty, assisted by four upperclass-persons who grade papers and tutor minority students.

Minority students admitted through SAAP are required to take a reduced course load the first semester unless their summer work has been exceptional. They must also take a reduced load during their second semester unless they have demonstrated the ability to handle a full course load during the previous semester. Since 1968, 148 minority group students have been admitted through the program, as indicated in table 1.

Table 1

Year	Minority Special Prog. Admissions	% of Admittees	Total Students in 1st Yr. Class
1968	10	8%	124
1969	19	11	180
1970	25	13	189
1971	25	17	151
1972	22	15	150
1973	23	13	175
1974	24	15	158
	148		1127

Source: Mildred Danielson, Assistant to the Director, SAAP, C.U. Law School, letter to William Levis, USCCR, MSRO, Oct. 4, 1974.

During the academic year 1973-74, the C.U. Law School Admissions Committee ruled that Asian Americans are not eligible for admissions under the SAAP. The committee had been granted authority tc consider whether or not Asian Americans met the eligibility criteria of the program which is defined as "...prospective law students who appear to have the intellectual ability to graduate from law school but would not otherwise be eligible under normal admission standards, and who are members of identifiable groups which have not had adequate educational and cultural opportunities available to them and which are seriously underrepresented in the legal profession."[50]

The committee reviewed both national and Colorado data before reaching its conclusion. They stated that although Japanese and Chinese Americans have less legal representation, 9.3 and 9.0 lawyers per 10,000, than whites, 16.2 lawyers per 10,000, their lower representation does not constitute serious underrepresentation. They stated that the educational level of Japanese and Chinese Americans, 12.5 and 12.4, respectively, and median income, $12,515 and $10,610, respectively, do not indicate educational and cultural deprivation. Further, they noted that C.U. Law School admits an average of 2 percent Asian American students each year and commented that this representation compares favorably with the percentage of Asian Americans in the United States population which is approximately 1 percent.[51]

The committee stated that they felt it was imperative to resolve the question because "...it is no secret that racially-based affirmative action programs in education, and particularly law school minority programs are under serious legal attack. Although the United States Supreme Court has not yet addressed the question, the emerging consensus of courts and commentators suggests that any institution adopting such a program will bear a heavy burden of justifying it in the event of legal challenge." They concluded that since it could not be shown that Asian Americans meet any of the eligibility criteria, other than being an identifiable group, their admissions through SAAP could only be supported on the basis of race. They felt that in the event of a legal challenge similar to the

DeFunis case the existence of the SAAP program would be jeopardized.

Three professors criticized the committee's decision, noting that Census Bureau data is an "inadequate measure of economic deprivation...for Asian Americans" and "educational level data is skewed upwards because of immigration laws." They also suggested to the committee that the Asian American group has a "bimodal pattern" of income distribution. This suggests that while the mean and median figures for Asian Americans are high, income is distributed unevenly, there being both quite wealthy and quite poor persons, and relatively few in between.[52] In spite of the above criticisms, the admissions committee has not rescinded its decision.

c. Summer Program

Minority group law students at C.U. expressed varied opinions regarding the worth of the summer program, which is one part of the SAAP. Commission staff interviewed 24 minority students out of a total minority student population of 69. Of these, 18 recognized a need for a summer program for minority students but recommended curricular or other changes. Four expressed no opinions about the summer program, and two said they did not feel a summer program was needed. They generally agreed that the concept of having a summer program for disadvantaged students was good but asserted that the C.U. program was less than ideal and recommended changes, such as obtaining professors for the summer program who sincerely want to teach minority students, the inclusion of more writing exercises, the teaching of language skills, the hiring of minority administrators within each staff category, and the inclusion of instruction on how to use the law library.

Charles Casteel, a black C.U. law student, suggested that the admissions committee look at alternative criteria instead of LSAT scores and UGPA for admission of minority group students. (pp. 219,239)

Law School Dean Courtland Peterson commented that perhaps the present program could become an orientation program instead of continuing its present structure. He stated that most faculty members feel that the present program adequately meets the needs of minority students and oppose the idea of changing the program's structure.

Gilberto Espinoza, a first-year law student at C.U., expressed some of the contradictory feelings which minority students hold concerning the summer program. He said that the program is helpful to minorities and would be helpful to any person regardless of ethnic background, but felt that the continuance of the summer program is not necessary. Later, he qualified that answer, stating that CLSA has been attempting to make sure that the minority program as it exists now is not cut back because it seems "that's the only open door we really have." (p. 225)

Although the interviews and hearing testimony indicate ambivalence among minority students concerning the necessity for and value of the summer program, results of a law school questionnaire indicate a desire for the continuance of the program. The questionnaire was developed by Professor William Rentfro, Director of the SAAP, and distributed to minorities admitted as students under the program. He received 32 replies, 10 from graduates and 22 from present law students.[53] In response to the question "Do you think the summer program should be continued," 30 responded yes and two answered no. At least 60 percent of those returning the questionnaires answered yes to questions regarding the program's effectiveness in helping them develop abilities to analyze cases, participate in socratic dialogue, synthesize different cases and principles, and do legal writing. Of the students who returned the questionnaire, all but four who attended the 1974 summer program felt they needed more writing experience.

A number of minority group students interviewed expressed the belief that the success of the summer program and their success in subsequent semesters are determined in part by professors' attitudes. They stated that if professors are indifferent, condescending, or hostile to the objectives of the summer program, then students gain very little from the experience. If professors are sincerely interested in teaching minority students, then the summer program is a positive experience, they said.

Some of the students who recognized a need for the summer program expressed the objection that, as presently administered, it stigmatized minority group students, labelling them as inferior students admitted under lower and special standards.

Professors at C.U. Law School, interviewed by staff members, generally feel that the summer program is essential. Professor Rentfro responded to student comments:

> I can't really say that I would quarrel with their perception on that (stigma) I think we try---at least most of my colleagues and I and those in the administration---we do our best to alleviate that as much as we can, but I don't know how it can be completely prevented in their perception if they are in truth and in fact admitted on some basis other than the rest of the student body. (p. 250)

Most professors at C. U. Law School believe that the summer program and tutorial sessions are necessary and beneficial. They view them as needed opportunities for minorities to enter the legal profession and compete with their peers.

Some minority students interviewed disagreed with Professor Rentfro's view that faculty members try to alleviate this stigma. They feel that there are certain professors who treat minority students differently than other students. They believe that the stigma affects professors' willingness to allow minorities to participate in class. The following comments are illustrative of their concerns. One student said that when the professors call on minority students they expect less from them than they do from other students. Another student commented that he is bothered by faculty attitudes concerning the abilities and qualifications of minority students. A third student expressed the belief that minorities are given the "cold treatment," and that the fact that minority students tend to become a clique is partly caused by professors' treatment of minorities in class. Professors often do not call on minorities in class, he said, and after a while minority students stop raising their hands. He said he feels that minorities are isolated during the first year because of bias on the part of faculty. A black student related that he was told by a professor that "people of your type don't make it in school." Another minority student said, "You know the hostility is there but it's not apparent (overt)."

Law student Gilberto Espinoza told the Advisory Committee:

> It's not a joke, it's actually a very serious thing amongst the minority students, but we talk about it openly...in reference to minority day, minority week, where the professor on that specific day or on that specific week will call only on minority students, and no other students in the classroom, when it comes to approaching minorities he always does it as a whole and sometimes some of their hypotheticals are sort of based on discrimination. (p. 224)

Mr. Espinoza later added:

> The faculty might aid him (a minority) in accepting him for the minority program, but then they turn around and they, I would almost call it invidious discrimination in reference to the minority because he has no real chance in the classroom, he's going to get a low grade whether he studies well or not. There's a blanket type of grading....system....Everybody talks about the anonymous grading system that there is at the school, but it doesn't seem to really, truly exist because the majority of minority students are always at the bottom of the list in grading. (p. 238)

Although the reasons for minority students' low grades can be attributed to factors such as the lack of adequate academic preparation prior to law school and during the summer program, they might also be attributed to low faculty expectations and negative faculty attitudes. If minority group students perceive that the faculty expects them to fail, they may in fact fail.[54]

Most C.U. minority students interviewed expressed concern that professors' discriminatory attitudes are the cause of lower average grades among minorities. They agreed that as a group they score lower than their white counterparts in tests. Mr. Espinoza summarized this feeling in response to the following question raised at the hearing:

> Q. Then you are alleging that the grading system, the professors in applying the system, discriminate against the minority student?

A. Well, the majority of us feel that way. I'm sure that perhaps some of the students may be at fault to a degree, in reference to attendance of class or anything that's a particular problem that students would have in general. But to the majority of us, it seems odd that the minority students are always clustered at the bottom. (p. 242)

A black student said that after he spoke to a professor because he felt the professor was excluding minority group students from class participation, he received the lowest grade in the class. The grade he received was about 10 points lower than grades he received in other classes, he said.[55]

Dean Peterson responded to the students' allegations:

> ...I'm confident that nothing in the way of specific discrimination in terms of grading has occurred, ...I think that it's mechanically made impossible by the anonymous grading system that we have.
>
> It is a system which requires students to sign their examination papers by number, the examination books are graded and...a list of grades is turned in with that number...that original list of grades, which is purely anonymous, remains part of the record, and there is very little in the way of variation between the grades that the faculty member may ultimately come up with (such as) changing the grades for classroom participation and so on.... (p. 263)

In an interview with Commission staff, Lawrence Treece, a white male C.U. law professor, agreed that some individuals on the faculty are hostile to minority group students but stated that the "hostility runs both ways." He viewed allegations of discrimination in grading by minority students as unfounded, for the reasons outlined by Dean Peterson. Professor Treece said that he cannot distinguish a minority "by their phrasing."

The issue of whether or not there is discrimination in grading on the part of C.U. Law School faculty remains unclear. The school's anonymous grading process

theoretically protects the student. As Dean Peterson notes, it would be difficult for a professor to memorize each student's number when there may be 35 to 40 students in the classroom. (p. 266) In spite of this procedure, however, the potential for discrimination exists, as one Advisory Committee member pointed out, because the professor may receive examinations directly from the individual students. (p. 266) Thus, it is conceivable that a professor could memorize one or two student numbers if he or she so desired.

d. Tutorial Assistance

Tutorial assistance is available to minority group students during their first academic year at C.U. Law School. The tutors are generally selected from minority students and upperclass persons hired on the basis of outstanding course work. Tutors meet with students 10 to 12 hours per week and are assigned for classes in legal procedures, torts, and occasionally constitutional law and contracts.

Minority group students expressed the same ambivalence toward tutorial assistance that they have toward the summer program. It is viewed as part of an academic program which stigmatizes them as inferior students. Some contend that their white counterparts resent them because they receive this additional help. Other students expressed the belief that there is a real need for tutorial assistance and viewed it as helpful.

e. Women's Issues

Out of 148 minority students, a total of 23 minority women have been admitted to C.U. Law School since 1968-69. Of that number, seven have graduated and five are currently enrolled. In some respects minority women differ from nonminority women. Many will have experienced discriminatory and inadequate educational preparation like minority men. In addition, they also face the problems encountered by all women in law school.

Nonminority women attending C.U. Law School do not appear to have the same problems minority students do. Their UGPAs and LSAT scores are not significantly different from white male students, as table 2 indicates.

Table 2

	Female	Male
1972		
UGPA	3.48	3.42
LSAT	646	654
1973		
UGPA	3.51	3.50
LSAT	635	650
1974		
UGPA	3.60	3.58
LSAT	660	664

Source: Mildred Danielson, Assistant to the Director, SAAP, C.U. Law School, letter to William Levis, USCCR, MSRO, Oct. 4, 1974.

Also, once nonminority women gain admission into law school, they do not differ significantly in terms of academic achievement from their white, male counterparts.

Since 1966-67, the number of white women attending C.U. Law School has increased substantially, as illustrated in table 3.

Table 3

First Year Classes - C.U. School of Law

Year	Number of Women	% of Class	Total Students
66-67	7	5%	136
67-68	13	9	147
68-69	11	9	124
69-70	19	11	180
70-71	23	12	189
71-72	35	23	151
72-73	24	16	150
73-74	44	25	175
74-75	38	24	158

Source: Statistics Provided by C.U. School of Law.

Judith T. Younger of Syracuse University stated:

> Once inside the professional schools women are not always warmly welcomed. There are still some professors who don't treat women even-handedly, who make remarks about "little girls" that reflect societal notions and raise the hackles of females in class.[56]

Her comment summarizes a major concern of white females at C.U. Law School, who are currently involved in efforts to increase the number of female professors on the law school faculty.

Since the care of children in our society is most often assumed by women, the accessibility of child care facilities is a factor which affects their decision to attend and remain in law school. Women students commented that the lack of day and night child care facilities is a problem at C.U. Law School. During the fall of 1974 several female law students proposed that C.U. Law School convert a complex of small offices on the first floor of the old building into a daycare center. The offices are located near the men's main toilet facilities, which the women recommended be converted into sanitary facilities for the daycare center.

Dean Peterson rejected the proposal stating that the offices in question are committed for use by a proposed Law Revision Center. He also mentioned possible problems of disruptive noise and the preemption of their largest toilet facilities.

In March 1975 Dean Peterson received a second proposal for an evening child care center. This proposal suggested using several large seminar rooms and moving the furniture in the rooms at the beginning and end of each evenings use. Dean Peterson rejected this proposal stating that the continual moving of furniture would be unsatisfactory and that the noise might disrupt students working on the Law Review in an adjoining room. In both instances he recommended that female students utilize child care facilities on the main campus. Yet at present, main campus child care facilities are not open for evening child care. However, Dean Peterson stated that he had discussed the arrangement of evening care hours with Vice Chancellor Corbridge, who agreed that an arrangement for evening hours could be made.[57]

2. University of Denver College of Law

a. The Minority Admissions Program

The D.U. Law School Bulletin states:

> The number of applications received by the College of Law greatly exceeds the number of students admitted. As a consequence, the Admissions Committee will admit only those students whose previous academic performance indicates a desire to excel and whose Law School Admission Test scores indicate an aptitude to cope successfully with the study of law.[58]

In addition, D.U. Law School has recognized the need for a minority admissions program and states that it will admit minority students "qualified for legal education but otherwise inadmissable to the College under currently competitive standards."[59]

A Minority Admissions Program (MAP) was initiated in summer 1967 with the assistance of a Ford Foundation grant.[60] Professor William Huff commented that D.U. Law School wanted to attract the best students from those minority students who could not be admitted under competitive standards. D.U. generally admitted minority applicants with the highest UGPAs and LSAT scores. Financial assistance in the form of a tuition waiver was provided, and the curriculum simulated a regular quarter of law course work, with courses in contracts, criminal law, criminal procedure, and torts. Students received no academic credit for the work.

Dean Robert Yegge of D.U. College of Law has termed it a "mini law school experience." He stated that the sole criterion for admission in the fall quarter was "their performance during the summer, rather than using the LSAT and grade point average, normal indices." (p. 163) In the second year of the program, Summer 1968, the Council on Legal Education Opportunity (CLEO) provided financial assistance. CLEO's participation allowed the law school to act as a regional institute for the council. As the regional institute, D.U. referred qualified students to other law schools within the region as well as to its own institution.

Commission staff interviewed 14 minority students presently enrolled at D.U. out of a total minority

population of 57. When asked by the Advisory Committee if they felt summer programs were necessary and helpful, three minority students at D.U. responded:

> ...they are helpful, but they're definitely not necessary...they give you a little bit of jump that gives you that extra confidence when you get to law school;
>
> ...I personally don't like them. And the reason I don't is because it does single you out as an individual that needs special help;
>
> ...I think they're very essential for Native American students coming into law school. (p. 187)

Only a few minority students interviewed felt that D.U. needs a summer program. Those who believed that a summer program was necessary stated that because minorities are victims of disparate and unequal educational preparation, they needed immediate access to law schools and the legal profession, and that the summer program gave minorities an opportunity to test their ability to succeed in the legal profession.

Others felt that it was unnecessary. Among the reasons given were that minorities are increasingly earning higher LSAT scores and UGPAs. One student expressed the view that the Minority Admissions Program is meaningless because the minorities who attend D.U. College of Law are already qualified. Another student felt that it was "too late" in the educational process for law school to attempt to improve the skills of minority group students.[61]

D.U.'s last summer program was held in 1972. At that time, the administrators of the program recommended its discontinuance based on the increased number of minorities graduating from undergraduate schools and the fact that the availability of a legal education had been communicated to minority graduates. They recommended that the Minority Admissions Program be restructured to reserve 25 out of approximately 285 seats in the first-year class for special admissions of minority candidates and that financial assistance be offered to minority students on the exclusive basis of economic need.[62]

During the fall of 1973, these recommendations became policy for the new Minority Admissions Program. Dean Yegge described the MAP as generaly successful, stating, "I think what we would assess as our greatest success...is the rather incredible retention rate and the rather incredible success rate of these students on the bar examination." (p. 165) Assistant Dean Jesse Manzanares commented, "If you want to gauge success in terms of numbers, it's been phenomenal. We have placed on the market in law-related areas...53 graduates; 38 of our graduates have passed bar examinations." (p. 199)

Administrators assert that the restructured program has enabled the law school to admit more minority students in the past 2 years. Table 4 shows the number of minority students admitted for the years 1967-1974.

Table 4
Minority Students Admitted

Year	Total 1-st Yr. Students	MAP	Percent of Total	Regular Admission	Total Minority	Percent of Class
67-68	218	11	5%	7(3%)	18	8%
68-69	194	9	5	1(0.5%)	10	5
69-70	297	16	5	3(1%)	19	6
70-71	260	13	5	5(2.0%)	18	7
71-72	276	12	4	1(0.4%)	13	5
72-73	272	13	5	4(1%)	17	6
73-74	272	24	9	3(1%)	27	10
74-75	282	24	9	5(2%)	29	10

Source: Data provided by Assistant Dean Jessee Manzanares, D.U. Law School, June 1975.

The table demonstrates a substantial increase in the proportion of minority students entering D.U. College of Law during the academic years 1973-1974 and 1974-1975.

This increase has resulted in a decrease in financial aid available for individual minority students. Dean Manzanares told the Advisory Committee: "We try in our minority admissions program to attract the cream of the crop of the minority community and we make every effort to do

that. We lose so many because we don't have adequate financial assistance." (p. 206)

All of the minority students interviewed at D.U. also viewed this as a major problem. The maximum amount of financial aid available at the law school is a full tuition waiver. Many minority students, however, only receive a tuition waiver for one-half or three-fourths of the tuition fee. As noted earlier, because of decreased financial aid, many minority students must work. This may conflict with class schedules and study requirements and force some minority students out of school. Ernest Jones, a black student, noted that D.U. Law School recently lost a first-year black student because of a job conflict.[63]

At present, no tutorial assistance is offered to students, minority or nonminority, at the law school. Several minority group students interviewed stated that they felt tutorial help should be available to every student, not only minority, whenever it is requested. When questioned at the hearing regarding tutorial assistance for minority students, Professor William Huff commented:

> There is no tutorial program for minority students...(the) program might well be counterproductive...indeed (it could) sometimes stigmatize...a law student who needed special help during the academic year....It appeared...that the problems arising out of it were probably too great for us to achieve it. (p. 195)

None of the minority students alleged overt discrimination at D.U. Law School. Mr. Jones expressed concern over the lack of black students at the law school. Currently there are only 9 black students (1 percent) out of 861 students at D.U. College of Law.[64] According to Mr. Jones, the administration cited lower LSAT scores and UGPAs and the lack of adequate financial assistance as the major reasons for not admitting more black students.[65]

b. Women's Issues

There are 226 women (26 percent) compared with 635 men (74 percent) in all three classes at the law school day and evening divisions. The female enrollment has increased from approximately 5 percent of new admittees in 1971 to 35 percent in 1974.

A female transfer student from Cornell interviewed by Commission staff commented that, although the number of women attending D.U. is greater than at Cornell, there was more surface hostility toward women at D.U.[66] Two other women interviewed thought that overt discrimination was not evident at D.U. College of Law but believed that subtle discrimination did exist. They viewed some professors' attitudes as being negative toward women and said that several professors make sexist remarks in the classroom.[67]

All but one full-time and one part-time faculty member are male. All female students interviewed invariably stated that they feel a need for more female professors.[68] They believe that the absence of female professors influences the law school curriculum as well as general attitudes toward female law students.

Women students felt that the subjects they may want to learn most about are not available. For instance, student Madeline Caughey stated at the hearing that "one of the frustrations that the women at the law school have experienced is getting established, on a permanent basis, a course on sex-based discrimination and the law." She also said that the faculty is not responsive to suggestions for setting up a clinical program dealing with problems of women in sex discrimination. (pp. 183-184)[69]

Another concern the women students voiced was the lack of child care facilities at the law school. One female student expressed the belief that this lack is a form of subtle discrimination.[70]

C. Student Organizations

1. Minority Student Organizations

Organizations composed of minority group students exist at both C.U. and D.U. Law Schools. At D.U. there are two minority group, law student organizations, viz., the Black American Law Students Association (BALSA) and the Mexican American Law Students Association (MALSA). At C.U. there are the Chicano Law Students Association (CLSA) and the Black American Law Students Association (BALSA). These organizations are involved in activities which directly affect minorities, such as recruitment of minority students, faculty hiring, and operation of the legal aid clinic.

At C.U. Law School, they work cooperatively with admissions personnel in efforts to identify minority law candidates.[71] They advise minority applicants of the existence of their respective organizations, available financial aid, the summer program, and other concerns. Minority applicants' files are subject to review by BALSA and CLSA, unless an applicant indicates that he or she does not want the files released. BALSA and CLSA also provide the admissions committee with information which might be relevant to minority applicants' success in law school.

BALSA and CLSA view the legal aid clinical program at C.U. Law School as an essential learning experience for minority group students. Therefore, the groups actively contribute recommendations concerning the goals, content, and structure of the program. Both organizations also provide psychological support for their members. In a sense, they offer a protective society within the law school and lessen possible feelings of isolation among their members.

At the University of Denver College of Law, the goals and activities of BALSA and MALSA are essentially the same. MALSA has a referral service for employment in addition to recruiting potential Chicano students. The two organizations have not been as concerned at D.U. as at C.U. with faculty hiring.[72] BALSA at D.U. College of Law is relatively small, with eight members, because of the small number of black students. The members are concerned primarily with recruitment of potential black law students and with faculty hiring.[73]

2. Women's Law Caucus

A Women's Law Caucus (WLC) exists at both C.U. and D.U. At C.U., the WLC has subcommittees which recruit female students, assist with faculty hiring, and identify and recruit women lecturers for law courses. WLC members at C.U. interviewed by the staff felt that their efforts are hindered because the WLC members do not have adequate time or resources to attract women students. Ann Saywetz of WLC expressed her concern over the administration's lack of interest in actively seeking out female students. She said that the students are forced to recruit because the law school is unwilling to do so. (p. 231)

WLC members have also attempted to involve themselves in the faculty hiring process.[74] They believe that their efforts have been frustrated because faculty candidates have been consistently scheduled to meet with them when students are preparing for final examinations.

The Women's Law Caucus at D.U. College of Law is primarily involved in recruitment of potential female law students. Its members have also been actively involved in efforts to establish a course on sex discrimination and the law and to some degree in the recruitement of female faculty.[75]

D. **Faculty**

1. **Affirmative Action Programs**

Pursuant to Title VI of the 1964 Civil Rights Act, all institutions of higher education receiving Federal funds are required to certify that all programs will be conducted, and facilities operated, in such a manner that no person shall be subjected to discrimination on the basis of race, color, or national origin.[76] Colleges and universities also are subject to Title IX, an extension to Title VI, which prohibits sex discrimination in education programs.[77]

Various agencies of the Federal Government, including the Department of Health, Education, and Welfare (DHEW), are responsible for the enforcement of the two laws. In 1965, President Johnson issued Executive Order No. 11246, later amended by Executive Order No. 11375, to strengthen the existing contract compliance program and obligate Government contractors to sign a seven-point, equal opportunity clause agreeing not to discriminate on the basis of race, color, religion, sex, or national origin.[78] The contractor also must agree to take affirmative action steps regarding the employment of minorities and women. The Office of Federal Contract Compliance Programs (OFCCP), created by the Secretary of Labor to enforce the Executive orders, has published detailed guidelines outlining compliance with them. The most comprehensive description of contractors' obligations is contained in OFCCP Revised Order No. 4, which requires the employer to analyze its work force and to establish an ongoing affirmative action program which eliminates work force deficiencies identified.[79] Public and private colleges and universities holding Government

contracts, including the Universities of Colorado and Denver, are subject to Revised Order No. 4.

DHEW, a designated compliance agency, issued a memorandum (the Holmes memorandum) to college and university presidents in December 1974, which emphasized that institutions must avoid reverse discrimination in carrying out affirmative action employment programs.[80] A recent study by the U.S. Commission on Civil Rights, Washington, D.C., found that the memorandum is ambiguous and misleading in essentially two ways.[81] First, by focusing on reverse discrimination to the exclusion of other concerns, it conveys the impression that the major problem facing universities is the danger that affirmative action will lead to the selection of women and minorities who are "less qualified" than other candidates. Secondly, the memorandum either misstates or excludes important qualifying information concerning the requirements of the Executive orders. As a result, the memorandum will more likely impede, rather than increase, integration of faculties at institutions of higher education.

The memorandum also reflects a fundamental error in DHEW's interpretation of Executive order regulations concerning goals and timetables. Under these regulations, a goal is to be established for ultimate elimination of underutilization and underrepresentation of minorities and women followed by the development of a realistic timetable for reaching that goal within the framework of expected turnover and affirmative action practices. The Holmes memorandum does not treat numerical goals as objectives for eliminating underutilizaiton and underrrepresentation but rather as estimated measures of the results of affirmative action.

The memorandum indicates that goals which reflect the employer's estimate of what should be accomplished from affirmative action will be satisfactory, regardless of whether they reflect any meaningful progress toward eliminating underutilization. In addition, the memorandum is derelict on the questions of job qualifications. It states that universities and colleges have the sole authority to determine job qualifications, not DHEW. This statement is misleading, since all job qualifications must be validated according to Executive order regulations. The Holmes memorandum further states that when DHEW reviews the validity of a job qualification, the agency will

substantially weigh the opinion of persons in the specific occupation. DHEW's position appears to be in violation of Executive order regulaticns, which require that validity studies be conducted in accordance with prevailing theories of psychometrics.

In addition to being required by law, affirmative action programs for faculty hiring are deemed necessary by minority group and female law students who view the program as a method to diversify faculty composition and stimulate curriculum changes. Students also express concern about the composition of the faculty because minority and female law professors are not available as potential role models.

Faculty interviewed by Commission staff at both C.U. and D.U. stated that it was difficult to recruit minority and female professors. Because the potential candidate pool is small, they are in demand by law schools throughout the nation. Occasionally, C.U. and D.U. Law Schools have utilized women and minorities as adjunct and visiting professors.[82]

The recruitment process is essentially the same at both institutions. Each uses a list of potential applicants compiled by the Association of American Law Schools (AALS). The association acts as a distribution point for law school graduates seeking faculty positions and receives resumes, which it then disseminates to law schools. It also holds a 3-day interviewing session to allow law schools to interview faculty candidates.

Because the major source of applicants is the AALS, its ability to refer available women and minority candidates has some effect on the eventual hiring of minority and female law professors. The chart below, showing the number of candidates on the AALS register by race and ethnicity, indicates that minorities and women constitute a small percentage of candidates, decreasing the possibilty that a minority or a woman will be selected.[83]

AALS Register		Percent
White males	389	87.6%
Blacks	9	2.0%
Chicanos	0	0.0%
Other minorities	7	1.6%
Women (includes minority women)	43	9.7%

a. University of Colorado School of Law

The law school at the University of Colorado has no minority professors and one white female visiting lecturer who will be working in the legal aid clinic for the academic year 1975-76. During the academic year 1974-75, the law school had no minority professors and one white female professor, who left in June 1975. During the academic year 1973-74 the law school had three white female professors (two full-time and one part-time) and one black male professor, a visiting lecturer.** Prior to 1970 the University of Colorado had never employed any female or minority professors.

The fact that minority group and female law professors have been offered 1-year temporary positions rather than 3-year contracts was questioned by one law student at C.U., who said:

> I feel that this process can be subject to abuse. In other words, to whom are the full-time, three-year contracts offered and to whom are the visitorships...(offered)?....I'm saying that the process is such that it could lend itself to an abusive situation. (p. 235)

She added:

> I think very few people could afford to move to Colorado to take a one-year job, beginning teaching job, with absolutely no guarantee of any followup....It could be used as an offer that people can't afford to accept. (p. 235)

Other students expressed great concern during the Advisory Committee's open meeting about the lack of minorities and women on the faculty. (pp. 219, 220, 226) A group of C.U. law students, the Committee for a Racially Integrated Faculty (CRIF), filed a complaint in April 1975 with the U.S. Department of Health, Education, and Welfare, Office for Civil Rights, charging discrimination in hiring in violation of Title VI and Title VII of the Civil Rights Act of 1964 and Title IX of the Educational Amendments of 1972. The complaint stated:

> ...the law school in conjunction with the university is receiving Federal assistance and yet it continues to discriminate by its failure and refusal to employ minority and women faculty members. This discrimination is apparent from the fact that at the present time there are no minority faculty members and only one female faculty member.[85] The sole female faculty member is untenured....They are also in violation of Executive Order 11246, which requires the adoption and implementation of nondiscrimination and an Affirmative Action Plan. The violation of this is obvious from the uniracial/unisexual composition of the faculty.[86]

The complaint also noted that:

> In the history of the law school there has never been a racial or ethnic minority person appointed as a permanent member of the faculty. The one woman who received tenure on this faculty obtained it only after a tremendous amount of student pressure was placed on tenured faculty and the administration.[87]

Dean Peterson explained the hiring process to C.U. law students in a memo dated April 1, 1975. He stated that all regular appointments require the vote of two-thirds of the faculty. He made the following comments about C.U.'s recruitment efforts:

> I should first explain that our potential candidate pool is obtained in three ways: (1) through direct mail inquiries to us by persons responding to our advertisements in the Chronicle of Higher Education or the Affirmative Action Register, or who simply know about the School; (2) through direct inquiries made on our own initiative to individuals we think might have an interest in teaching here; and (3) through the Association of American Law Schools Faculty Appointment Register, in which any interested person may register and have his or her resume circulated to all the 127 law schools which are members of the Association. There is substantial overlap between the first and third groups. This year, for example, it appears that about 76

persons who contacted us directly also registered with the AALS.[88]

He further pointed out that the administration wrote to 14 white women, 1 black male, and 1 Chicano male on its own initiative to inquire about their interest in teaching at C.U.

CRIF challenged C.U.'s recruitment efforts. The group stated:

> Recruiting through traditional limited channels and 'word of mouth referrals'...illustrates a basic lack of good faith efforts, e.g. the most recent vacancy in the Legal Aid Clinic was filled without publication or notification, thus no announcement could be expected to reach qualified minorities and women.[89]

Dean Peterson stated that in November 1974, C.U. Law School sent representatives to interview 27 AALS-registered candidates in Washington, D.C. Of these, five candidates were invited to Boulder for further interviews: two white men, two white women, and one black man. After the interviews, one white man was offered a regular appointment, and a white woman was offered a visiting appointment. The white man accepted and the woman declined.[90]

The dean stated that the law school interviewed seven additional candidates, for whom it paid travel expenses: one Chicano male, one black male, two white women, and three white men. The result of these interviews was the regular appointment of one white man. The law school also made visiting (1-year) appointments of two white men, who were selected from a pool of law professors presently teaching at other law schools. These faculty members were selected without an interview after a review of their credentials and references. C.U. Law School also made an offer of a visiting appointment to a white female professor at another law school. She declined the offer.[91]

Dean Peterson commented on C.U. Law School's overall affirmative action effort, saying that it is "guided by two principles: (1) it should identify qualified candidates of all kinds, but with particular emphasis on females and members of minority groups; and (2) having identified, evaluated and compared such candidates, it should offer

appointments to those who are most highly qualified without regard to sex and color." (emphasis added) He defended the regular appointment of two white men, stating, "I believe that the faculty has done its best to make decisions in accordance with both of these principles. The fact that only two white males received regular appointments does not raise any presumption to the contrary."[92]

This response, however, raises the question of how much more well qualified do minorities and women have to be than they are presently or in relationship to other competitors for positions. Isidoro Rodriquez of CRIF said, "We are not challenging faculty members with malevolence or conspiracy or questioning their integrity. We are, however, complaining of inattention to the requirement and spirit of nondiscrimination and affirmative action." The requirement and spirit Mr. Rodriquez referred to are that:

> Affirmative action requires the contractor to do more than ensure employment neutrality...(it) requires the employer to make additional efforts to recruit, employ and promote qualified...members of groups formerly excluded, even if that exclusion cannot be traced to particular discriminatory action on the part of the employer. The premise of the affirmative action concept of the Executive order is that unless positive action is undertaken to overcome the effects of systemic institutional forms of exclusion and discrimination, a benign neutrality in employment practices will tend to perpetuate the status quo...indefinitely....[93]

b. University of Denver College of Law

D.U. College of Law has employed approximately 30 full-time faculty members for the past 3 years. Of those, one is a Chicano, Jesse Manzanares, hired in 1972, and the other is a white woman, Cathy Krendl, hired in 1973. They were the [illegible], full-time faculty members hired by the College of Law. ([illegible]60) There is also a white female, part-time adjunct professor, and Cathy Krendl said that there are two other women available, who "are not presently teaching but...are available to teach certain special courses, should those courses be offered." (emphasis added) (pp. 155-196) In addition, there are two Chicano attorneys, one a woman, who works within the clinical education program.

Dean Yegge of D.U. College of Law stated at the informal hearing that D.U. has an affirmative action plan approved by the Department of Health, Education and Welfare, Office for Civil Rights, but the lack of available positions at the law school is a problem. He added that the law school currently has one vacancy, and the leading candidates for the position are women. (p. 168)

Dean Manzanares said that other problems are the lack of available minorities and women qualified and interested in teaching law and the extreme competition among institutions for those who are available. He said, "I'm sure Cathy (Krendl) will tell you that there are numerous law schools she could go to; there are numerous law schools I could go to. There is active recruitment throughout the profession (and) law school community." (p. 201)

Cathy Krendl expressed concern about the lack of female professors at D.U.[94] She stated, however, that in her opinion the law school has made a good faith effort to employ women. She said, "Our recruitment efforts have...become more difficult because women have been very popular this year in particular." (p. 196)

Two members of the D.U. Women's Law Caucus expressed concern about the lack of affirmative action at the law school in a letter to the U.S. Commission on Civil Rights. They stated:

> WLC is currently reviewing the University of Denver's affirmative action program. We find inconsistencies and blatant disregard for the goals and objectives filed with H.E.W. The voluntary plan speaks of articulated hiring policies, of procedures for national searches to locate minorities for job openings and for the submission of detailed explanations to the affirmative action officer (of D.U.) for failure to hire a minority. Our investigation to date finds little evidence of implementation.[95]

They questioned the selection process by faculty members who are in the position to hire women as being "...based on the personality of the applicant. The kind of woman professor acceptable to most of our male faculty is one with proper demeanor - an aggressive, articulate attorney is described as 'arrogant' if it happens to be a

women."[96]. They also alleged that the part-time faculty positions pay such a small amount of money, only $150 per quarter, that few women can afford to accept these positions.[97]

A D.U. law professor stated that D.U. Law School does not recruit for adjunct professor positions because it is deluged with applications. He said that there have been few applications from women and minorities.[98]

E. Post-Law School Access to the Legal Profession - The Bar Examination

1. The Bar Examination Nationwide

Every State requires that persons wishing to practice law in that State pass the State bar examination.[99] Each has a Board of Bar Examiners, and most have had such boards for 50 years or more. In most States, the supreme court rather than the legislature or the chief executive has maintained exclusive control over the examining process.

Although States vary somewhat in the objectives of the bar exam, the National Conference of Bar Examiners has stated in general that:

> The bar examination should test the applicant's ability to reason logically, to analyze accurately the problems presented to him, and to demonstrate a thorough knowledge of the fundamental principles of law and their application. The examination should not be designed primarily for the purpose of testing information, memory, or experience.[100]

Within the past 40 years, several efforts have been made to institute a "national bar examination." States have been traditionally opposed to any moves to diminish their sovereignty over admission to the State bar. In 1967 a special committee was formed at the National Conference of Bar Examiners (organized in 1931) to conduct an indepth study of the bar examining process. After several years, the special committee and the entire conference approved the Multistate Bar Examination (MBE).[101] It was originally designed to assist State examiners in grading and measuring their results against an objective standard.[102] It was also developed to meet the challenges of those who claimed that essay bar examinations are culturally biased. (p. 328)

The MBE section of the bar exam was first given in 1972 by 19 States to fewer than 5,000 applicants. In 1974 it was given to some 24,000 applicants in 41 States.[103] With the exception of the MBE, the content and focus of the bar exam vary widely from State to State, as does the cutoff point established for passing or failure.

An article in a 1973 edition of The Bar Examiner by a University of Pennsylvania law professor analyzed a number of questions concerning minorities and the bar exam in that State, questions which are probably relevant in a general way to many States. The article did not consider minority women as a separate category. They were counted with the minority men applicants. The professor indicated that between 1955 and 1970, 97 percent of those taking the bar were white, and 3 percent were black. Of these, 98 percent of the whites eventually passed, while fewer than 70 percent of the blacks passed. The author pointed out that the Board of Bar Examiners is in a position to make discretionary decisions about whether or not to raise the grades of some applicants who obtained less than the passing grade, and in this process there was opportunity for unconscious (or even conscious) racial discrimination.

The possibility for unconscious discrimination existed, the author believed, for several reasons. First, almost all the people who made up and graded the bar exam questions were white. If the writing, style, grammar, choice of words, and sentence structure were unfamiliar to them in a cultural way, they might tend to credit the exams less well. He also felt that black applicants went into the exam with greater fear of failure than nonminority applicants. This apprehension and the fear that they "weren't going to be given a fair break," may have a negative effect on their performance.[104]

There appears to be a growing demand in some quarters for abandonment or at least major revision of the bar examination system, especially by minorities. There have been lawsuits in some 14 States within the past several years, brought mainly by minority plaintiffs, challenging the constitutionality of the bar exam in those States. The suits center around contentions of unconstitutional discrimination based on race and national origin and have mostly been brought as class actions in Federal court by unsuccessful minority bar applicants.

Many of the suits are similar. They make allegations, based on statistics concerning the disproportionate pass-fail ratio on the exam between minorities and nonminorities, that there is de facto racial discrimination. They claim a prima facie case and seek to place the burden on the defendant-examiners to prove that the bar examination system is indeed valid, using testimony and evidence from testing experts.[105]

During 1974 three significant decisions favoring bar examiner defendants were handed down by Federal district courts in Alabama, South Carolina, and Georgia.[106] In each of these cases, the court ruled that the plaintiffs were unable to prove that they had been discriminated against.[107]

A bill was introduced in the U.S. House of Representatives early in 1975 which deals with the question of access to the legal profession by minorities. The proposed law offers an alternative solution to present problems affecting minority applicants who fail the bar examination. The proposed legislation asserts that underrepresentation of minorities in the legal profession, among other factors, constitutes unavailability of equal access to legal services and consequently poverty among the poor and minorities. It would permit the Federal court to create a special bar exam committee to administer a "comprehensive bar exam" to minority applicants if requested in States where the percentage of minority candidates passing the bar is 25 percent or more below the percentage of other candidates taking the exam.[108]

2. Colorado Bar Examination

a. Bar Membership Requirements

To practice law in Colorado, a person must be admitted to the bar. Based on bar examination results, the State Board of Law Examiners makes recommendations to the Colorado Supreme Court, which determines who is admitted to practice law.[109] The State board is divided into two subgroups, the law and bar committees. The bar committee is composed of seven attorneys appointed by the court for 5-year terms who review the ethical and moral qualifications of bar applicants. The 11-member law committee administers the examination given to bar applicants. It consists of seven Anglo men, one Anglo woman, one black man, and one Chicano.

The woman, who was appointed to the committee in fall 1974, is the first female ever appointed in Colorado.

The law committee drafts the essay portion of the bar examination, which consists of 6 questions chosen from 10 predetermined subjects. The essay questions are graded by the bar examiners with four additional graders. Grading generally is based on the taker's ability to identify issues specified by the examiners. Also, as in approximately 40 other States, Colorado administers the Multi-State Bar Examination (MBE), which has a multiple choice format and is machine-graded.

To assure that the examinations are graded anonymously, each applicant is assigned two numbers. The first number is assigned before the exam is given and the second is handed out with the exam. Only the secretary to the State Board of Law Examiners has access to the code. Once the questions are graded and scores recorded, the supreme court releases to the public the names of those who have passed. Each applicant is also notified individually of his or her results. The actual test scores are not sent to the applicant except on request. Applicants may take the bar examination a second time if they fail to pass the first test. After that, they must petition to retake the examination.

b. Effects on Minorities and Women

The U.S. Census for 1970 documents that approximately 5.3 percent of the lawyers in Colorado are women even though they comprise 38.2 percent of the civilian work force.[110] Likewise approximately 4.3 percent of the lawyers in Colorado are minority although they constitute 12.7 percent of the civilian labor force. Minority women comprise a mere 0.1 percent of attorneys in Colorado. There are only five minority women lawyers in Colorado according to the U.S. Census data. The advent of minority admission programs at the Universities of Colorado and Denver has increased the number of minorities taking the bar examination. The number of women attending law school and entering the legal profession has also increased, but both groups remain underrepresented.[111]

Statistics from many States indicate that minorities are passing the bar examination at a lower rate than Anglo men and women. As a result, lawsuits challenging the bar

examination have been initiated in a number of States. According to Chief Justice Edward Pringle, eight suits are pending against the Colorado Supreme Court. In general, these lawsuits allege that the bar examination discriminates against minorities. The plaintiffs contend that the bar examination is a medieval fraternity rite, which merely duplicates the testing functions of law schools. In addition, petitioners allege that the State court is acting as an employment agency in licensing attorneys and that any discrimination in the bar exam is therefore covered by Title VII of the 1964 Civil Rights Act. (42 U.S.C. § 2000e)[112] They argue that as a result the Colorado Supreme Court is obligated to validate the bar examination by professionally acceptable methods if the plaintiffs statistically demonstrate that it discriminates against a particular group covered by Title VII. As of fall 1975, no cases had come to trial. In other States, however, Federal courts have ruled that the bar examination is not covered by Title VII. Consequently, the Colorado Supreme Court has stated that the bar examination does not have to be validated.[113]

Because of the underrepresentation of minorities and women in the legal profession, the Colorado Advisory Committee voted in December 1974 to study the bar examination for possible cultural bias. Chief Justice Pringle in January 1975 indicated that the court would cooperate. He said, however, that the court does not keep racial and ethnic breakdowns of applicants and that therefore it would supply all information on an anonymous basis.[114]

The Commission hired Dr. Gary McClelland, a faculty member (Ph.D.) in psychology (psychometrics) at the University of Colorado, to conduct a statistical study of the bar exam.[115] Dr. McClelland conducted the study in two parts. The initial part was a tabulation of pass rates by race, ethnicity, and sex, and the second was a profile analysis. Initial tabulation showed that "...the passing rates of both Chicanos and blacks are significantly (statistically) lower than the rate for Anglo males."[116] Dr. McClelland noted that there is a relatively small number of applicants who are not Anglo males.[117] Although Colorado's population is comprised of 41 percent Anglo male, 17 percent minorities, and 51 percent women, of whom 9 percent are minority women, bar applicants (from February 1972 to February, 1975) were 8.5 percent minorities and 9 percent women.

The first phase of the study also revealed the following average pass rates for each bar examination: 77 percent for Anglo men, 79 percent for Anglo women, 58 percent for Chicanos, 41 percent for blacks, and 71 percent for Native Americans.[118] Their eventual pass rates are 90 percent for Anglo men and women, 79 percent for Chicanos and Native Americans, and 59 percent for blacks. (pp. 278-279)[119]

Because the initial analysis showed a disparate pass rate for minority applicants, Dr. McClelland conducted a profile analysis of how applicants scored on the six essay questions and five MBE sections on each test.[120] Using the list compiled by the Commission, the supreme court supplied Dr. McClelland with the anonymous scores for each question on each exam for each minority person, woman, and a representative sample of 40 Anglo men. Dr. McClelland was unable to do a profile analysis of Native Americans or minority females because of their small numbers. His analysis of black applicants is not as accurate as those of Anglo men, Chicanos, and women because of their small number. All minority women are charted both as Chicano or black and as women.

The results of this analysis indicated that there appears to be no cultural bias as far as women are concerned: "...Women as a group do neither statistically better nor worse than Anglo males in terms of either pass rates or average scores."[121] This is true even though one question on the February 1974 exam has been singled out as offensive to women.[122] The profile analysis showed that women did better on this question than their male counterparts.

Dr. McClelland's study found: (a) the claim that minorities do relatively worse on business-related essay questions is not supported by the data; (b) Chicanos perform relatively worse than Anglos on the MBE property and evidence questons; and (c) partly due to (b) above, Chicano scores on the whole MBE, when compared to their essay scores, are low relative to Anglo MBE scores.

Dr. McClelland concluded that although the objective of both tests is to measure minimum legal competency, the supreme court's scoring rules, which determine who passes the exam, assume the essay portion and MBE multiple choice portion are measures of the same legal competency and do not

recognize the fact that essay and objective tests tap different cognitive skills.[123] According to Dr. McClelland, one effect of the scoring rules is that they may unfairly penalize minority applicants because a separate adjustment formula is not used for minority applicants.[124]

The issue of whether or not the bar examination, taken as a whole, is culturally biased against minorities was not resolved by Dr. McClelland's study. He states that either the MBE is biased against minorities or the essay portion is biased in favor of minorities or both. Dr. Gregg Jackson of the U.S. Commission on Civil Rights, Office of Research, points out that the evidence only weakly suggests such a bias. Both Dr. McClelland and Dr. Jackson agreed that in order to make a clear determination as to whether or not the Colorado bar examination is a culturally fair test, Dr. McClelland needed external data which is not presently available; i.e., a representative sample of lawyers who have had their job performance accurately measured and have also taken and passed the bar examination in Colorado.[125]

c. Recent Changes in the Colorado Bar Examination

The State supreme court and the law committee have initiated several changes in the bar exam during the last several years. Before its first revision in 1972, the bar examination consisted only of essay questions in areas which focused on both national and State questions. Since the Multistate bar examination was added, the bar examination has concentrated on questions of national scope.[126]

The Multistate Bar Examination was adopted in Colorado in 1972. Since the examination has been used in Colorado, its effect as discussed by Dr. McClelland has been detrimental to minorities.[127] Chief Justice Pringle stated that the MBE was adopted in an attempt to eliminate artificial barriers that exist for minority applicants, but he no longer is sure that it has been effective in doing this.[128] In an attempt to administer a fair test, the supreme court and the law committee have changed grading standards several times in order to minimize the impact of the MBE.[129]

For instance, on the February 1972 exam an applicant had to score 75 or more on at least 4 of 6 essay questions and answer at least 20 out of 40 questions correctly on 3 out of 5 MBE sections in order to pass. On the February

1975 examination, if an applicant passed 4 out of 6 essay questions and had an average essay score of 72 or over, the MBE score did not count.[130] If an applicant had a lower average score and passed at least three essay questions, the MBE score was used to determine whether an applicant passed. Currently, an average combined MBE and essay score of 70 is passing.

Except for the July 1973 bar examination, the overall passing rate for all applicants has remained between 65 and 75 percent. However, in July 1973 the changing of grading standards resulted in substantially different pass rates for bar applicants. At this time 93 percent of the applicants passed. The July 1973 grading standard made it possible to pass the bar examination without passing more than one essay question if the applicant's overall average was more than 70.

According to Ray Jones of the law committee, the increased pass rate can be attributed to either or both of the following factors: the applicants taking the examination were better prepared, or the supreme court's grading standard allowed applicants to pass who would not have done so in previous years. (pp. 320-321).[131]

Some members of the supreme court and the law examiners were pleased with the high pass rate. However, the court was alarmed because an applicant could pass the examination without passing more than one of the essay questions. As a result of the court's concern, the scoring procedures were again revised with the assistance of the Educational Testing Service.

In summary, although there have been several grading changes, the main difference between the current bar exam scoring standards and previous standards is that an applicant can now pass the examination without passing the MBE.

Prior to July 1974, applicants who failed the bar examination had no right to petition the court for a review and regrading of their test.[132] Minority applicants who failed the examination interviewed by the Commission staff stated that the lack of a review process was detrimental to them.[133] As a result of their concerns plus others voiced by applicants, the supreme court established a method for reviewing examinations of those applicants who fail the test

and request a review. The purpose of the review is to ensure that the applicant receives all the points he or she should have on the essay test.[134] An examiner, acting as a hearing officer after notice, conducts a hearing under the failing applicant's petition for review. The hearing officer then prepares and submits to a three-person committee of the Colorado State Board of Law Examiners the hearing officer's findings, conclusions, and recommendations. The committee reviews the matter and then makes its recommendations to the court, which may adopt or reject them.

All petitions for review are considered by the State supreme court. Results of the first appeal process show that 25 petitions for review were accepted from applicants who failed the July 1974 exam. As a result of that review process, 13 of the applicants who petitioned were admitted to the Colorado Bar.[135]

d. Suggested Changes

Many of the interviews and some of the testimony presented at the May 10 open meeting stressed the need for alternatives to the present bar examination in Colorado. When the Advisory Committee met with Chief Justice Pringle, he was asked if a study had ever been done to correlate success on the bar examination with success in the practice of law.[136] He stated that to date no study had been done and expressed the belief that the bar exam was necessary because law schools are graduating students who are not qualified to practice law.[137] Both he and Justice Groves believe that it is possible to graduate from law school without taking courses essential to practicing law.[138]

Dean Robert Yegge and Professor William Huff of D.U. College of Law agree with the justices that not all law school graduates are prepared to practice. Professor Huff emphasized that D.U. trains "law persons" and not just lawyers. (pp. 169-170, 211)

The answer to the question of whether the bar exam is necessary is an important one in Colorado. Chief Judge Harry Silverstein of the State court of appeals has expressed concern that many older practicing attorneys are incompetent. Judge Siverstein, a former chairman of the State Board of Law Examiners, felt that something must be

done to lessen the sharp increase in complaints and disbarments.[139]

One solution that has been suggested is continuing legal education. Several States require that newly licensed attorneys and practicing attorneys take a certain number of hours of classroom instruction to ensure that they are familiar with the most recent laws and procedures. Although no State has used this approach in lieu of the bar exam, Professor Eli Jarmel of D.U. Law School made such a suggestion at the May 10, 1975, open meeting. He said that when he taught in New Jersey he suggested that the State supreme court require an intensive course in preparing legal documents (wills and probate) instead of a bar exam for law school graduates. New Jersey adopted the course prerequisite in addition to the bar exam.

At the Colorado Advisory Committee's open meeting, Professor Jarmel presented a variation on the New Jersey system. He suggested that the bar examination be eliminated because it duplicates law school work. Instead of the bar exam, he suggests required legal skills training for certain members of the graduating class (the bottom third or lower half) before they would be certified to practice. (p. 295)[140] Professor Jarmel contended that students in the upper portion should not have to take the course since their competence is clearly demonstrated in law school. He admitted that his plan might adversely affect minorities. He stated, however, that until the law schools assume the responsibility of graduating only those who are capable of practicing law, his plan is sensible. (pp. 293-295, 302)

In addition to questioning the validity of the essay portion of the bar exam, Professor Jarmel was adamantly opposed to the MBE. He said that when the MBE was developed, he was approached to review some of the questions on evidence. He disagreed with two of the four "correct" (suggested) answers.[141] He stated that his answers differed because he had more insight into the questions than the person who drafted them. He also objected to the MBE because it asks for majority rule which may not always be the best rule. (p. 305)[142]

The suggestion most often heard by the Advisory Committee in interviews and during the open meeting was the adoption of "diploma privilege." The "diploma privilege" refers to granting bar admission to all graduates of ABA-

accredited law schools. Judge Otto Moore, former chief justice of the Colorado Supreme Court, felt that diploma privilege is imperative. He alleged that in the 1940s and 1950s the State supreme court lowered the passing standards to admit the children of State officials who otherwise would have failed the bar examination. In 1957 Chief Justice Moore formally proposed to the court that it admit all graduates from Colorado schools on motion to alleviate the juggling of grades. His proposal lost four to three. Judge Moore expressed the belief that if the State schools were told that 2 years hence they would be responsible for the professional performance of all their law graduates, the schools would accept the responsibility. The judge felt that the Colorado Supreme Court should continue to administer a bar examination for applicants from out-of-State schools.[143]

Ray Jones of the State Board of Law Examiners stated that the board discussed such a proposal several years ago, but it was not adopted. He objected to the instate proposal because he felt it unfairly discriminated against those persons such as himself who went to out-of-State institutions. (p. 321) Professor Jarmel also objected to an instate, out-of-State dichotomy, noting that the U.S. Supreme Court has ruled that the Constitution guarantees every person the freedom to travel. He said that to limit the diploma privilege to instate graduates would deny other graduates the opportunity to practice law in Colorado. However, a counterargument is that five States currently make such a distinction, and the courts have not ruled the plans unconstitutional.

Many Chicanos and blacks favor the diploma privilege. The National Bar Association, a predominantly black organization, endorsed such a proposal in 1970. King Trimble, president of the Sam Carey Bar Association, a predominantly black Colorado group, said that it also favors diploma privilege. Mr. Trimble testified at the open meeting that the law schools, not the supreme court, should screen out persons who are not capable of practicing law. He felt that it is unfair to the applicant and to the profession to carry someone through law school for 3 years knowing that he or she will fail the bar exam. Mr. Trimble was emphatic that the law schools have two important responsibilities. First, they must admit all those who are qualified to attend law school. Second, and most importantly, they must fail those students who cannot make

it. University of Colorado law professors have admitted that they carried two minority students through 3 to 3 1/2 years of law school without graduating them.[144] This negative experience cost the students many thousands of dollars and 3 years of their lives.

Mr. Trimble offered another reason why he felt the bar examination should be eliminated. He contended that blacks generally have a negative attitude toward the exam because of historic discrimination on the exam nationally and noted that most blacks have to take the bar exam twice before passing.

Although Chicanos statistically score higher on the bar examination than blacks, they also advocate changes. In his brief filed with the Colorado Supreme Court challenging the constitutionality of the exam, Jacob Pacheco listed a number of alternatives to the present bar exam.[145] His first option was diploma privilege with certain required courses. In support of that position, Professor Cathy Krendl testified at the open meeting that students should prepare to practice law in law school and not be preparing for a State bar examination. (p. 211) Most Chicanos interviewed support the diploma option. They also support the other options proposed by Mr. Pacheco.[146]

His second alternative is a mandatory 2-month training course for all law school graduates. The program would be conducted in cooperation with the Colorado Supreme Court and a law school. Mr. Pacheco also suggested a 1-year internship with a legal services or similar program or with an experienced attorney. These internships could occur during or after graduation from law school. The major criticism of the last proposal is that States which have attempted to implement them have abandoned the practice due to failure. For instance, some programs and attorneys have used their law interns as "errand boys" instead of training them for the practice of law.[147]

Judge Moore has suggested two alternatives to the present system which would have to be adopted nationwide to have much impact. They are both patterned after the medical profession. First, as the California bar now does, States should require law students after their first year to pass a test on legal fundamentals before going on to the second and third years. Second, as Mr. Pacheco has previously suggested, law schools should establish an internship

program in the last year or upon graduation whereby a student would have to prove competence before being allowed to practice.[148]

To date, the Colorado Supreme Court has attempted to incorporate improvements which are reasonable and feasible. It feels that progress in this area is being made, particularly in improving the uniformity of grading standards of recent examinations.

NOTES TO CHAPTER II

1. Brief for the Association of American Law Schools as amicus curiae, p. 6, DeFunis v. Odegaard, 416 U.S. 312 (1974) (hereafter cited as AALS brief).

2. Ibid., p. 8.

3. Ibid. p. 15.

4. Brief for the American Bar Association as amicus curiae, p. 7, Defunis v. Odegaard, 416 U.S. 312 (1974) (hereafter cited as ABA brief).

5. Ibid., p. 9.

6. Ibid., p. 23.

7. Brief for the Council on Legal Education Opportunity as amicus curiae, p. 2, DeFunis v. Odegaard, 416 U.S. 312 (1974) (hereafter cited as CLEO brief).

8. Ibid.

9. Ibid., p. 18.

10. American Bar Association, "Law Schools and Bar Admission requirements, A Review of Legal Education in the United States," 1974, pp. 36, 38, and 39.

11. Brief for the Mexican American Legal Defense and Education Fund (MALDEF) et al. as amici curiae, p. 3, DeFunis v. Odegaard, 416 U.S. 312 (1974).

12. Brief for the President and Fellows of Harvard College as amicus curiae, p. 13, DeFunis v. Odegaard, 416 U.S. 312 (1974).

13. CLEO brief, p. 20.

14. ABA brief, p. 20.

15. Jonathan Kozol, Death at an Early Age, pp. 45-46, as cited in ABA brief, p. 10.

16. See U.S., Commission on Civil Rights, A Better Chance to Learn: Bilingual-Bicultural Education, May 1975; U.S.,

Commission on Civil Rights, The Mexican American Education Study, Reports 1-6, April 1971 - February 1974; U.S., Commission on Civil Rights, The Southwest Indian Report, May 1973; El Boricua: The Puerto Rican Community in Bridgeport and New Haven, a report of the Connecticut Advisory Committee to the U.S. Commission on Civil Rights, January 1973; In Search of a Better Life--The Education and Housing Problems of Puerto Ricans in Philadelphia, a report of the Pennsylvania Advisory Committee, January 1974; Bilingual/Bicultural Education--A Privilege or a Right?, a report of the Illinois Advisory Committee, May 1974; Educational Neglect of Mexican American Students in the Lucia Mar Unified School District, Pismo Beach, California, a report of the California Advisory Committee, January 1973; The Schools of Guadalupe...A Legacy of Educational Oppression, a report of the California Advisory Committee, April 1973; and Asian Americans and Pacific Peoples: A Case of Mistaken Identity, a report of the California Advisory Committee, February 1975.

17. Ray Williams, "Exorcising Resistance to Black Horizons in the Legal Profession," BALSA Reports, Fall Quarterly, 1974, p. 5.

18. A self-fulfilling prophecy is defined by sociologist Robert K. Merton as a prophecy which becomes truth when one acts upon a false definition of the situation and by such actions makes it come true. If a teacher expects less from minority students because he or she thinks they are less bright, this false definition of the situation may influence the behavior of both student and teacher. The teacher may call on minority students less and may be extremely critical of their work. The students may perceive that they cannot compete academically with their peers and they may quit trying. The result of their combined behavior is that the false definition of the situation, that minority students cannot compete, appears to be truth.

19. U.S., Commission on Civil Rights, Para Los Ninos - For the Children, Clearinghouse Publication 47, October 1974, p. 10 (hereafter cited as Para Los Ninos).

20. Anglo refers to any person who is not black, Spanish origin, Native American, or Asian American.

21. Para Los Ninos pp. 10-12.

Samuel C. Thompson, "A Response to Professor Haskell's .ic Plantation Theory," American Bar Association Journal, vol. 60, December 1974, p. 1527.

23. Kozol, in ABA brief, p. 11.

24. See Derrick A. Bell, "Law School Exams and Minority Students," BALSA Reports vol. 3, no. 3, Spring Quarterly 1974, p. 39.

25. Thompson, "A Response to Professor Haskell's Academic Plantation Theory," p. 1527.

26. K.C. Carlson and Martha Taylor, letter to MSRO staff, June 9, 1975, MSRO files.

27. George A. Theodorson, Modern Dictionary of Sociology (United States: Apollo Edition, 1970), p. 355.

28. Page numbers in parentheses cited here and hereafter in text refer to statements made to the Colorado Advisory Committee at its open meeting May 10, 1975, as recorded in the transcript of the meeting.

29. It should be noted that many nonminority students at both C.U. and D.U. Law Schools also receive financial aid and may encounter difficulties similar to those of minority students.

30. The amount available for nonresident students is higher because of the higher tuition rate.

31. Dean Yegge stated that although the university was having financial difficulties, $143,000 had been allocated in financial aid during the academic year 1974-75 for minority law students. He said that he believed the university would continue this level of monetary commitment in future years.

32. If minority students must leave day school, they have the option of attending night classes at D.U. Law School.

33. Frederick M. Hart, President, Law School Admission Council, and Dean, University of New Mexico School of Law, prepared statement before the Special Subcommittee on Education and Labor, U.S. House of Representatives, Sept. 20, 1974, pp. 19-22. (hereafter cited as Hart Statement).

34. 401 U.S. 424 (1971).

35. The LSAT has undergone about 400 validity studies over the past 25 years to determine whether and to what extent it predicts law school performance. The results demonstrate its validity but also demonstrate that it would be unwise to admit students solely on the results of the test unless there are no other data available. (Hart statement, pp. 6 and 9.)

36. Francis Swineford and Lawrence Wightman, "Law School Admission Test - Comparison of Black Candidates and Chicano Candidates with White Candidates, a report for the LSAT Test Development and Research Committee," April 1972.

37. W. Garnet Flickinger, chairman, memorandum to members of Law School Admission Council from Test Developments Research Committee concerning "Predicting Law School Grades for Black American Students," W.B. Schrader and Barbara Pitcher, March 1973 (hereafter cited as Flickinger Memorandum).

38. Barbara Pitcher and W.B. Schrader, "The Interpretation of Law School Admission Test Scores for Culturally Deprived Candidates: An Extension of the 1966 Study Based on Five Additional Law Schools," a study for the Law School Admission Council, September 1972.

39. Ibid.

40. Robert L. Linn, "Test Bias and Prediction of Grades in Law School," a paper prepared for the Conference on the Future of Law School Admission Council Research, Sept. 27-28, 1974.

41. Hart Statement, p. 24.

42. Pitcher, "Predicting Law School Grades for Female Law Students."

43. For example, at C.U. Law School there are 10 minority women (2.2 percent) out of a total student body of 457. At D.U. Law School, there are 8 minority women (0.9 percent) out of 887 total students.

44. Statistics provided by Dean Peterson, C.U. Law School, to Dr. Shirley Hill Witt, Director, MSRO, May 27, 1975, MSRO files.

45. Hart Statement, p. 20.

46. School of Law, University of Colorado Bulletin, 1974-75, pp. 10-11.

47. C.U. Law School provided data on minority admissions only since the onset of its present minority admissions program in 1968.

48. C.U. Law School has provided the Advisory Committee with female admission statistics dating from 1966.

49. Admission into the SAAP provides only provisional admittance for minority students to C.U. Law School. Regular admittance is contingent upon successful completion of the 8-week summer program with a minimum grade of 67. If a student scores below 67, the decision to admit him or her for the fall semester is made by the two SAAP professors, tutors, the program director, and that student.

50. Admissions Committee Report on Asian Americans, memorandum to Dean Peterson, January 1975, MSRO files (hereafter cited as Admissions Committee Memorandum).

51. U.S., Bureau of the Census, Special Report, Japanese, Chinese, Filipinos, PC(2)-(1)G.

52. Admissions Committee Report, p. 13.

53. The returned questionnaires represent 29 percent of the 108 questionnaires distributed.

54. See discussion of self-fulfilling prophecy, p. 12.

55. Walter Benjamin, interview, Feb. 12, 1975.

56. Georgia Dullea, "More Women in Law and Medicine," New York Times, Jan. 15, 1975.

57. Letter from Dean Courtland Peterson, C.U. Law School to Dr. Shirley Hill Witt, June 6, 1975, MSRO files.

58. University of Denver Bulletin, College of Law, 1974-76, p. 7.

59. Minority Admissions Program, brochure for University of Denver Law School, 1973.

60. In its first year the program restricted admittance to Chicanos. During subsequent years it included other minority groups such as blacks and Native Americans.

61. Interviews with minority students, D.U. Law School, February through May 1975.

62. Report of the Faculty Committee on Summer Minority Program to D.U. College of Law, 1972, p. 2.

63. Interview on Feb. 6, 1975.

64. Ibid.

65. Excludes students working on a combined degree and those enrolled who already have law degrees.

66. Nancy Connick, interview on Feb. 6, 1975.

67. Chris Waisenen and Martha Taylor, interviews on Feb. 7, 1975, and Apr. 10, 1975.

68. A total of nine female law students were interviewed.

69. D.U. College of Law offers courses entitled, "Constitutional Law" and "Modern Constitutional Problems" which may be directly related to many legal problems women currently have. They do not have a course entitled "Women and the Law" at present.

70. Sally Barrett, interview on Apr. 9, 1975.

71. The primary source of identification for prospective law school minority group students is a list of those persons taking the LSAT, which is provided for BALSA and CLSA or MALSA by the admission office of both schools.

72. One reason for this may be that D.U. currently employs one Chicano faculty member and two clinical program instructors, a man and a woman.

73. At present there are no black law professors at D.U. College of law.

74. C.U. Law School had three female professors in 1973 but currently has none since the recent resignation of a female professor.

75. This course was offered in the spring of 1975.

76. 42 U.S.C. §2000d.

77. 42 U.S.C.§§ 1681-1683.

78. Executive Order No. 11246, 3 C.F.R., 1964-1965 Comp., p. 399; Executive Order No. 11375, 3 C.F.R., 1966-1970, Comp., p. 684.

79. 41 C.F.R. §§ 60-2.

80. Memorandum from Peter E. Homes, Director, OCR, DHEW, to College and University Presidents, December 1974.

81. Much of what follows was taken directly from U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Effort - 1974, Vol. V, pp. 212-236 (January 1975).

82. Adjunct professors are hired either to teach a specific course or for a short period of time and are not regular faculty members.

83. Dean Courtland Peterson, memorandum to law students, Apr. 1, 1975, MSRO files (hereafter cited as Peterson memo).

84. American Bar Association report from the University of Colorado School of Law, 1972-73 through 1974-75.

85. The female faculty member referred to in this letter left the law school in June 1975.

86. Committee for a Racially Integated Faculty (CRIF) to Gilbert Roman, April 18, 1975, MSRO files (hereafter cited as CRIF letter).

87. Ibid.

88. Peterson memo.

89. CRIF letter.

90. Peterson memo.

91. Ibid.

92. Ibid.

93. CRIF letter.

94. Cathy Krendl, interview on Apr. 1, 1975.

95. Carlson and Taylor letter.

96. Ibid.

97. Ibid.

98. William Huff, interview on Apr. 9, 1975.

99. As of 1973, there were five States (Mississippi, Montana, South Dakota, West Virginia, Wisconsin) which admitted to the bar all persons who graduated from instate law schools.

100. John Eckler, "The Multistate Bar Examination - August 1974," The Bar Examiner, vol. 43, nos. 7-8, p. 126.

101. The MBE is drafted by the National Conference of Bar Examiners in conjunction with the Educational Testing Service (ETS). The questions drafted by law professors throughout the country are meant to test legal knowledge in five subject areas. Although the MBE is machine-graded and tabulated by ETS, each jurisdiction has the final word as to its passing scores and relative value compared to the essay portion, which is drafted independently by each State.

102. Daniel C. Blom, Chairman, Washington Board of Bar Examiners, The Bar Examiner, vol. 44, nos. 1-2, 1975, p. 11.

103. Ibid., pp. 127-129.

104. Address of Paul Bender, Professor of Law, Univ. of Penn. Law School, "Constitutionality of Bar Examination," The Bar Examiner, vol. 42, nos. 3-4, pp. 55-64.

105. Clyde O. Bowles, Jr., member, Illinois State Board of Bar Examiners, remarks in "Review and Assessment of Suits Attacking State Bar Examinations Systems," The Bar Examiner, vol. 43, nos. 1-2, 1974, pp. 9-18.

106. The Georgia case was affirmed by U.S. court of appeals in August 1975. See Tyler v. Vickery, ___F. 2d___, 44 U.S.L.W. 2118 (5th Cir., 1975).

107. Ibid., and The Bar Examiner, vol. 43, nos. 7-8, 1974, pp. 133-145.

108. H.R. 2276, "The Legal Practice Equal Opportunity Act of 1975," was introduced by Representative Hawkins, Jan. 28, 1975.

109. The court created the State Board of Law Examiners "...to investigate and examine applicants as to their educational and professional qualifications, general and legal, for admission to the Bar..." (Rule 201, Colorado Rules of Civil Procedure).

110. U.S., Bureau of the Census, Detailed Characteristics, Colorado, 1970, "Occupation of Employed Persons by Residence, Race, and Sex," PC(1)-D7, table 171.

111. King M. Trimble, Esq., President, Sam Carey Bar Association, interview, Apr. 22, 1975.

112. Brief for plaintiff re: defendants' motion for clarification of issues, p. 9, Pacheco v. Pringle, C.A. 5219 (D. Colo.); and Cordova v. Pringle, C.A. 74-A-430 (D.Colo.). Also see Sigezawa, immediate past chairman, remarks at the National Conference of Bar Examiners, The Bar Examiner, vol. 43, nos. 5-6, 1974.

113. Chief Justice Edward Pringle, Colorado Supreme Court, interview on Jan. 28, 1975 (hereafter cited as Pringle interview). See Tyler v. Vickery, ___ F. 2d___, 44 U.S.L.W. 2118 (5th Cir., 1975).

114. In order to identify the minority applicants, the Commission submitted lists of all applicants who took the bar exam from February 1972 through and including February 1975 to four minority attorneys for identification. The lists were submitted to Jesse Manzanares, Assistant Dean, University of Denver Law School; Pete Reyes, Mexican

American Legal Defense and Education Fund; Louis Kelley, Assistant Attorney General, State Attorney General's Office; and Jacob Pacheco, Colorado Rural Legal Services.

115. Dr. Gary McClelland, Ph.D., psychology professor, University of Colorado, "Statistical Analysis of the Colorado Bar Examination - February 1972 to February 1975," (study prepared for the U.S. Commission on Civil Rights - Mountain States Regional Office), MSRO Files, July 1975 (hereafter cited as McClelland Study). See Appendix A.

116. McClelland Study, p. 6.

117. Ibid., p. 4.

118. Seven Native Americans took the bar examination.

119. Eventual pass rate is defined as the percentage of applicants eventually passing the bar examination. It includes those who may have failed the exam one or more times if they eventually pass the exam.

120. The profile analysis was utilized to attempt to identify particular essay subjects or MBE topics that are differentially difficult for members of minority groups. A profile analysis cannot determine whether the test as a whole is culturally fair, but only whether the pattern of individual topic scores is consistent with an interpretation of cultural fairness.

121. McClelland Study, p. 26.

122. Ray Jones, Colorado Law Examiner, interview in February 1975, and Dolores B. Kopel, Esq., interview in February 1975. Also see question below, Colorado Bar Examination, Division VI, February 1974.

> Sally Silicone, a resident of the small community of Buxomberg, U.S.A., was eighteen (18) years old at the time she consulted Attorney Loud regarding her rights against Dr. I.M. Familiar, a 69-year-old general practitioner in the community of Buxomberg. The doctor, while treating Sally for mononucleosis, noticed her concave characteristics and suggested to Sally that he could guarantee to improve her sex appeal by some simple injections. Dr. Familiar had Sally sign a written consent form agreeing to such an operation.

The consent form indicated that such a procedure could possibly produce side effects of "cancer, or post-procedure tenderness." Sally was sixteen (16) years old at the time of the surgical procedure.

Two years later, the procedure had, in fact, proven so successful that Sally was unable to purchase clothing to suitably contain her new-found development and gradually she became the laughingstock of Buxomberg.

Sally repeatedly called Dr. Familiar and complained of pain and attempted to get him to give her an appointment or have the doctor prescribe something to relieve her pain. The doctor repeatedly advised her "for your newly acquired beauty, you must have some pain and shortly it will fade away."

Shortly after being consulted, Attorney Loud attended a holiday cocktail party. After downing a few cocktails, Attorney Loud decided to telephone Sally's parents who were old clients of his and who now were residents of Canada. In the presence of a dozen of the party participants, Attorney Loud explained in a boisterous manner to Sally's parents the delicate problem confronting Sally. He concluded by saying "ole Doc Familiar really blew the works. Sally now looks like an old sow and strumpet." Attorney Loud concluded by urging Sally's parents to return to Buxomberg to console their daughter.

Several of the party-goers related Sally's plight to their bridge groups and to Sally. Sally became infuriated and promptly fired Attorney Loud and consults you regarding what action should be taken against whom and what defenses can be expected if such action is taken.

Briefly state what other causes of action exist between any of the parties, if any?

123. Since February 1974, the Colorado Board of Bar Examiners has used a formula to predict applicants' MBE scores based on the essay portion of the examination.

124. Justifying a separate adjustment formula, Dr. McClelland noted that if the MBE scores are to be made

equivalent to the essay scores within each ethnic group those of Chicanos need to be raised more than those of Anglos. Also see note 113 supra.

125. See appendix B for Dr. Gregg Jackson's discussion concerning Dr. McClelland study.

126. "Questions of national scope" are selected from subjects that law school faculties and the legal profession as a whole feel are essential to the practice of law anywhere in the country.

127. See McClelland Study, pp. 19-25, for a complete discussion.

128. Pringle interview.

129. Grading standards for February 1972 through February 1975 Colorado Bar Examinations provided by the Colorado Supreme Court.

130. There are at least three States which do not grade the essay portions of their bar examination if an applicant achieves a certain score on the MBE. No matter how well an applicant scores on the Multistate Bar Exam in another State, the Colorado Supreme Court insists that he or she take both parts of the bar examination.

131. See also Ray Jones, Colorado Law Examiner, interview on Feb. 19, 1975.

132. At present, the essay portion but not the MBE section of the test is available for review by the applicant.

133. David Cordova, Margaret Martinez, Edmund Noel, interviews on Jan. 30, 1975, Apr. 29, 1975, and Apr. 30, 1975, respectively.

134. David Cordova, Pablo Encinas, Chief Justice Pringle, and Maurice Reuler, chairman, Colorado Board of Law Examiners, interviews on Jan. 30, 1975, Apr. 21, 1975, Jan. 28, 1975, and Jan. 28, 1975, respectively.

135. Ibid.

136. In an attempt to answer the question of whether the bar examination is necessary, the Educational Testing Service is

conducting a study correlating LSAT scores, law grades, bar exam scores, and success in practice. Because of limited data, however, the study will not break down the information by race and sex.

137. Pringle interview.

138. Justice James K, Groves, Colorado Supreme Court, interview on Apr. 9, 1975, and Pringle interview.

139. Interview on Feb. 4, 1975.

140. According to Professor Jarmel, "Lawyers spend a considerable amount of their time producing products. They may be articles of incorporation or wills or real estate documents, they spend a good deal of their time in just interviewing clients, a good deal of time negotiating and counseling people....If we developed a course that attempted to plug in on those kind of factors and evaluated the work product of people in that form, that would give us an alternative device (to the bar exam)." (p. 295)

141. Alternatives presented by the MBE are not designed to include a "correct" answer but the examinee is to ascertain the answer which is most nearly correct.

142. The majority rule is that which is accepted by most jurisdictions in the United States. It is not necessarily the better or more enlightened rule. See Transcript, p. 305.

143. Judge O. Otto Moore, Denver District Attorney's Office (former Colorado Supreme Court justice), interview on Feb. 5, 1975.

144. Professors Jonathan B. Chase, William Rentfro, and Lawrence Treece, C.U. Law School interviews on Feb. 14, 1975, Mar. 18, 1975, and Feb. 12, 1975, respectively.

145. Brief filed in the Colorado Supreme Court in the matter of the petition of Jacob E. Pacheco for a review of February-March 1973 Bar Examination, May 10, 1974.

146. David Cordova, Pablo Encinas and Duane Montano, Margaret Martinez, and Robert Romero and Doug Vasquez, interviews on Jan. 30, Apr. 21, Apr. 29, and Jan. 31, 1975, respectively.

147. Chief Judge Harry S. Silverstein, Jr., interview on Feb. 4, 1975.

148. Interview on Feb. 5, 1975.

III. FINDINGS AND RECOMMENDATIONS

The Colorado Advisory Committee finds that significant obstacles militating against minorities becoming licensed attorneys are not limited to admissions policies of law schools or bar examinations. The Committee believes that among a complex of socioeconomic factors the primary and secondary educational system is the most influential and does not generally prepare minority students for advanced academic careers. However, the Advisory Committee could not undertake a broad study, although it is needed, which would focus on the primary and secondary educational system's effect on minorities and women. The following findings and recommendation, therefore, are limited to the professional education level and bar examination.

Findings: Employment of Faculty and Administrators

1. The Law Schools--C.U. and D.U.

The Advisory Committee found that despite recent recuitment efforts the lack of minority and female faculty members and administrators is an apparent serious failing at C.U. and D.U. Law Schools. Neither law school has an affirmative action plan designed to eliminate underrepresentation of minorities and women. Instead, they have their goals included in a general plan for their respective universities.

In addition, the Committee found that the law schools have an affirmative responsibility to hire women and minorities for the effective teaching of law as a response to expressed student needs for improved faculty and administrative-student communications and most importantly under Executive Orders 11246 and 11375 and Revised Order No. Four.

C.U. and D.U. Law Schools primarily recruit faculty candidates through advertising in the Affirmative Action Register and the Chronicle of Higher Education and use the Association of American Law Schools (AALS)-Faculty Appointment Register. The Committee found that the AALS-Faculty Appointment Register has few minorities and women. Similarly, the impact of advertising in the Affirmative Action Register and Chronicle of Higher Education cannot be measured because not all minority and women organizations

concerned with the legal professions subscribe to, and consistently use, these publications.

2. **Department of Health, Education, and Welfare (DHEW): Relationship to Affirmative Action Programs in Law Schools**

A December 1974 memorandum from Peter H. Holmes, director of DHEW's Office for Civil Rights, to college and university presidents stresses OCR's new policy that institutions, not the Federal Government, have the right to determine who is the "most qualified" candidate and to turn down a candidate who is "less well-qualified than the candidate actually selected." The memorandum is misleading in conveying the impression that a major problem for universities is that affirmative action will lead to selection of less "qualified" women and minorities.

Under the policies stated in this memorandum, C.U. Law School is technically in compliance with Executive Orders 11246 and 11375 in hiring two Anglo men to fill recent vacancies although there are no women or minorities on the faculty. The Advisory Committee disagrees with DHEW's current interpretation of the Executive order.

Recommendations: Employment

1. Because of the underrepresentation of minorities and women, the Advisory Committee recommends that C.U. and D.U. Law Schools make every effort to fill their next faculty and administrative vacancies with qualified minority and female candidates. They should develop additional direct recruitment methods to ensure that they reach all potential minority and female candidates. The following is a partial list of organizations which may not subscribe to the Affirmative Action Register or Chronicle of Higher Education and individuals who could be helpful in locating minorities and women in the legal profession: American Indian Graduate Scholarship Program, University of New Mexico School of Law, 1117 Stanford N.E., Albuquerque, N.M. 87106; Derrick A. Bell, Jr., Professor of Law, Harvard University Law School, Cambridge, Mass. 02138; The Catalyst, National Headquarters, 14 East 60th St., New York, N.Y. 10022; Elaine Jones, Esq., NAACP Legal Defense and Educational Fund, Inc., 10 Columbus Circle, New York, N.Y. 10019; Mexican American Legal Defense and Education Fund, 145 Ninth St., San Francisco, Calif., 94103; National Council of La Raza, 1025

15th St., N.W., 4th Floor, Washington, D.C. 20005; National Council of Black Lawyers, 126 W. 119th St., New York, N.Y. 10027 (represented in the Denver region by Fred Charleston, 2130 Downing); Native American Rights Fund, 1506 Broadway, Boulder, Colo. 80302; Sam Carey Bar Association, King M. Trimble, Esq. 1711 Pennsylvannia, Denver, Colo. 80203; Japanese American Citizen's League, National Headquarters, 1765 Sutter St., San Francisco, Calif. 94115.

The law schools should also actively encourage minority and female graduates to go into teaching. The schools should consider the creation of a program to hire recent C.U. and D.U. law graduates, particularly minorities and women, as teaching assistants to give them teaching experience and increase the faculty candidate pool.

2. The Advisory Committee recommends that the C.U. and D.U. Law Schools establish specific goals and timetables for the placement of minorities and women in faculty and administrative positions.

3. The Joint Budget Committee of the Colorado Legislature, acting on a sense of responsibility for encouraging affirmative action in hiring at C.U. Law School, should strongly recommend to the law school that it take affirmative action to fill any upcoming faculty or administrative vacancies with minority and/or women candidates.

4. The Advisory Committee recommends that the national director of the Office for Civil Rights, DHEW, rescind the policy decisions embodied in OCR's December 1974 memorandum regarding compliance with Executive Orders 11246 and 11375 and follow existing Executive order guidelines issued by the Office of Federal Contract Compliance.

5. The Advisory Committee also recommends that the Office of Federal Contract Compliance Programs (OFCCP), U.S. Department of Labor, pursuant to its authority under 41 C.F.R. §60-1.6(e), review DHEW's regulations for the administration of Executive Orders 11246 and 11375, in particular the policies stated in OCR's December 1974 memorandum, to evaulate compliance with the Executive orders. It should mandate that the memorandum be modified or rescinded and rewritten.

Finding: Faculty-Student Relations

The Advisory Committee found that minority and female students voiced strong complaints about negative attitudes based on race and sex manifested by some professors at both C.U. and D.U. Law Schools. Negative comments and attitudes of professors are damaging to student performance.

The Advisory Committee found that, although C.U. Law School graduates felt that the SAAP was beneficial, some currently enrolled C.U. minority students admitted to the program expressed concern that faculty attitudes toward them are negative, hostile, and condescending. They felt that they are stigmatized due to their admission under special standards. Several faculty members agreed that some stigma and hostility exists.

Recommendation: Faculty-Student Relations

Deans Peterson and Yegge should establish a grievance committee at each law school to resolve complaints concerning incidents alleging racial and sex discrimination. Such committees should be composed of both students and faculty and should be given authority to take corrective action.

Finding: Curriculum at D.U. Law School

The Colorado Advisory Committee heard repeated statements from minority and female students that the existing curricula at D.U. Law School do not adequately meet all of their educational needs and interests.

Recommendation: Curriculum

The D.U. Law School curriculum committee should seek out, evaluate, and initiate new course offerings which would be relevant to minorities and women. The committee should establish a mechanism for student recommendations in determining specific course offerings. The law school should establish courses such as "Women and the Law" and "Immigration Laws" on a continuing basis and if necessary hire specialized faculty persons to teach these courses.

Finding: Financial Aid for Minority Students at D.U. Law School

D.U. Law School does not provide minority students adequate financial aid. This lack of financial aid is

especially severe and may hinder academic adchievment or even force some minority students to drop out of school.

Recommendations: Financial Aid

The raising of adequate amounts of financial aid money should be a priority for D.U. Law School. Financial aid money allocated tc minority students should be sufficient to cover anticipated deficits in essential living costs such as food, housing, and books in addition to tuition waivers.

Both law schools should seek more Federal funding as a source of financial aid assistance. The following programs are possible sources of such funds:

1) U.S. Department of Health, Education, and Welfare, Office of Education: National Defense Direct Student Loans and Loans to Institutions of Higher Education (Naticnal Defense Education Act of 1958, Title II, 20 U.S.C. §421);

2) DHEW, Office of Education: Higher Education Work Study Program (Higher Education Amendments of 1968, 20 U.S.C. §1101);

3) U.S. Department of the Interior, Bureau of Indian Affairs: Indian Higher Education Grants (Snyder Act, Nov. 2, 1921, 25 C.F.R. §32);

4) DHEW, Office of Education: Special Services for Disadvantaged Students in Institutions of Higher Education (Higher Education Amendments of 1968, 20 U.S.C. §1101).

Finding: Exclusion of Asian Americans from SAAP at C.U. Law School

The law school's SAAP admissions committee has determined that Asian Americans do not qualify for admission through SAAP because it cannot be shown that as a group they are economically, culturally, or educationally disadvantaged. The Colorado Advisory Committee, however, believes that many Asian Americans, particularly from rural backgrounds, suffer from economic deprivation and racial discrimination common to other minorities and do need special assistance.

Recommendation: Asian Americans

C.U. Law School should admit Asian American students into the SAAP who meet the disadvantaged criteria. The students' disadvantaged status could be documented by the socioeconomic level of the students and their families. Similarly, the educational level of the parents could also be used as an index for determination of disadvantaged eligibility.

Finding: Examinations at C.U. Law School

The Advisory Committee heard much testimony from minority students alleging that some law professors graded minority students in a discriminatory manner. The Committee feels that students' concerns cannot be dismissed since the potential for abuse of the anonymous grading system exists whenever the professors directly receive the examination from the student.

Recommendation: Examinations at C.U. Law School

The Committee recommends that Dean Peterson establish another method for collecting examinations from students. The method of examination collection should ensure that law professors do not directly receive the examinations from the students.

Findings: Bar Examinations--General

Based on its investigation, the Colorado Advisory Committee found that the bar examination in Colorado has a disparate and therefore discriminatory effect on minority applicants. The proportion of blacks, Chicanos, and Native Americans passing the bar examination is significantly lower than the proportion of nonminorities, both male and female. The Committee heard several witnesses contend that a person who has successfully graduated from an ABA-accredited law school should be qualified to practice law in Colorado. These witnesses asserted that a lawyer's competency cannot be measured by the bar examination.

Further, the Advisory Committee finds that the bar examination duplicates one function of law schools, which is to test students on their knowledge of law. The testimony before the Committee tends to support the position that the responsibility for producing and testing competency of

lawyers should be placed on law schools. Moreover, the Committee found that problems faced by minority applicants taking bar examinations are not limited to Colorado, but extend throughout the nation. Studies on the cultural validity of the bar examination, such as Dr. McClelland's, are presently impeded because no attempts have been made to evaluate the ability of the bar examination to measure a lawyer's competency against actual job performance. The Advisory Committee found that the American Bar Association has the influence and stature to alleviate some of the disparate effects of the bar examination on a national level.

Recommendations: General

1. The Advisory Committee, therefore, recommends that the American Bar Association encourage the elimination of State bar examinations for graduates of ABA-accredited law schools. In lieu of the bar examination, the ABA should establish national uniform requirements for law courses which students must take in order to graduate and be admitted to State bars. The mandated course requirements should be those which are necessary to develop competency as a lawyer, including torts, contracts, property, constitutional law, evidence, conflicts, and civil and criminal procedures. In order to determine whether the law schools are complying with its course requirements, the ABA should develop a uniform, culturally validated test to be administered to students after the second year of law school, to test their knowledge and indicate possible deficiencies in basic subject areas. The Advisory Committee believes that this recommendation is a potential problem and should be implemented only after the necessary amount of research has been undertaken on its cultural and job performance validity. The Committee does not recommend that this test be administered unless the cultural and job performance validation research on it is complete; to do otherwise could establish another test which poses many of the same problems, common to the present bar examination and LSAT, for minorities. After standards for passage are determined, the individual law schools should establish guidelines for continuance or termination of marginal students. The decision to continue and graduate marginal students should be that of the law schools and affected students.

2. The Colorado Advisory Committee also recommends that the Colorado Supreme Court eliminate the bar examination in Colorado and establish law course requirements consistent with those in the above recommendation for all persons who wish to practice law in the State. The court should adopt a rule that, 3 years hence, all applicants to the bar who have graduated from an ABA-accredited law school and have taken and passed required courses will be admitted to practice in Colorado without examination.

In order to allay fears that the law schools will not accept this responsibility, the Advisory Committee recommends that the Colorado Supreme Court require a culturally-validated test in basic subject areas following the second year in law school. The Colorado Advisory Committee believes that the two above recommendations are the most desirable and should be implemented. Until the implementation of the above recommendations, the Committee suggests the following actions as interim measures. The following findings and recommendations are listed below in order of desirability.

Finding: Multistate Bar Examination

Dr. McClelland's study indicated to the Colorado Advisory Committee that the MBE portion of the bar examination has a disparate and therefore discriminatory effect on minority applicants. They score significantly lower on the MBE portion in relation to their scores on the essay portion of the examination and in relation to nonminority applicants.

Recommendation: Multistate Bar Examination

The Colorado Advisory Committee recommends that the Colorado Supreme Court eliminate the MBE portion of the State bar examination. The Committee further recommends that the Colorado Supreme Court immediately admit to the bar all applicants, minority and nonminority, who have failed the MBE but passed the essay portion of bar examinations administered since the MBE was instituted in Colorado in 1972.

Finding: Grading Methods

The Advisory Committee found that grading methods for the bar examination have varied considerably since 1972.

For instance, in the first several administrations, grading methods specified that an applicant had to pass four out of six essays and a fixed number of MBE subjects in order to pass the exam. The most recent administrations of the bar examination have utilized an average of scores for each portion of the bar examination to determine the overall grade for each applicant. An applicant still must pass three of the six essays.

Recommendation: Grading Standards

The Advisory Committee recommends that the Colorado Supreme Court continue to use its present grading methods. The present rules are in accordance with Dr. McClelland's recommendation that passing grades should be based on the average of all portions of the test.

The Committee further recommends that the supreme court make this grading revision retroactive and admit to practice all persons who achieved acceptable scores according to present rules since February 1972.

Finding: Role of Educational Testing Service

The Colorado Advisory Committee found that the Educational Testing Service exerts a great amount of influence in the decision process which determines who will be admitted into law school and subsequently be licensed to practice law. It not only administers the Law School Admission Test and MultiState Bar Exam but also drafts tests used to determine admission to college. The Educational Testing Service agrees that minorities score lower than nonminorities on the LSAT but has not yet actually validated its tests for possible cultural bias.

Recommendation: Educational Testing Services (ETS)

The Advisory Committee recommends that the U.S. Commission on Civil Rights undertake a study to evaluate standardized tests formulated by ETS in order to determine whether or not cultural bias exists. The Law School Admission Council should stop using the LSAT until it has been culturally validated.

Appendix A

Statistical Analysis of the Colorado Bar Examination, February 1972 to February 1975

by Gary McClelland, Ph.D.
Department of Psychology
University of Colorado

Introduction

The primary purpose of this statistical analysis is an examination of the cultural fairness of the Colorado Bar Examination: do individuals with the same amount of legal ability have an equal chance of passing the exam, regardless of their ethnic group or sex? This section describes the data available to answer this question and discusses the limitations of these data and the inherent limitations of any statistical analysis.

This analysis covers the seven administrations (2 per year) of the Colorado Bar Examination from February 1972 to February 1975. During this period, the exam has consisted of two parts: an essay portion divided into six subjects each graded from 0 to 100[1] and a multiple-choice portion divided into five subjects each graded from 0 to 40 (one point for each correct answer). The multiple-choice portion is known as the Multistate Bar Examination (MBE) and is administered nationwide by the Educational Testing Service of Princeton, New Jersey. Thus, there are 11 separate scores plus relevant sums and averages available for each individual taking the exam.

Using the published lists of applicants' names and of those passing the exam, the Denver regional office of the United States Commission on Civil Rights identified individuals in various ethnic groups by contacting

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[1]Sometimes extra credit is given for recognizing certain issues in the problem, making the effective maximum score 110. In this set of scores only 4 out of 4000 were greater than 100.

local ethnic organizations and minority group lawyers. While many identifications were independently confirmed, there are undoubtedly a few misclassifications, but these few cases would not alter the basic conclusions reported below. The scores of all individuals identified as Chicano, Black, Native American, or female were requested from the Colorado Supreme Court. For comparison purposes, the scores for 40 randomly selected Anglo males were requested for each administration also. These scores were provided with the cooperation of Chief Justice Pringle and Justice Groves of the Supreme Court. Mrs. Catharyn Abels, secretary to the State Board of Law Examiners, transcribed the scores in a manner that protected anonymity but allowed classification into ethnic groups. The cooperation and assistance provided by the Supreme Court, Mrs. Abels, and the Commission on Civil Rights are gratefully acknowledged.

Despite the large number of scores available for this study, the type of information usually considered in a psychometric analysis of cultural fairness was not available. This is not to say that access was denied, but rather that the additional information does not exist. In a typical psychometric analysis, scores on an examination are compared to some external performance criterion (*e.g.* GPA in the case of college admissions tests, or job supervisor ratings and production indices in the case of employment tests). If the exam score is a good predictor of the criterion, then the test is said to be valid. A test is then culture-fair if it is equally valid[2] for each ethnic or sex group. Thus, to do the standard analysis, it would be necessary to rate recent admittees to the Bar on their legal competence or skill. Agreement on exactly how to

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[2]Several different definitions of "equally valid" exist in the technical literature, but they are not of concern here because of the lack of a criterion.

make such ratings is unlikely in the present case; furthermore, performance ratings would not have been useable because of the ethical and legal necessity of anonymity. Nevertheless, it is possible to detect aspects of cultural bias using various other statistical techniques; this is the approach of the present study. However, it is extremely important to note that even if all the tests conducted in this study fail to detect cultural bias, that would *not* imply that the Bar examination was absolutely culturally fair. Rather, it would only imply that the exam was not culturally biased in those specific aspects examined.

Finally, a few comments are necessary about the nature of statistical tests. If a difference in scores is observed for two groups, then that difference may be caused either by a real difference in their true abilities or by chance fluctuations in performance (*e.g.* having a bad cold on the day of the exam, having by chance just reviewed the topic the night before, etc.). Statistical tests are simply techniques for separating the real difference case from the chance fluctuation case. Of course, that determination cannot be perfect; rather, associated with each statistical test is a probability which indicates the confidence of the conclusion. The phrase "statistically significant" used in this paper means that the observed difference has a very high probability (95 percent or greater) of reflecting a real difference. The ability of a statistical test to detect a real difference is partly a function of the number of observations in each group. With more observations, the average score is more reliably determined and a real difference is easier to detect. With a small number of observations a true difference may not be detected.

Because of the small number of minorities taking the exam, this was a problem in the present study. For example, since only a total of seven

Native Americans took the exam across the seven administrations, statistical analysis for that group was not possible. Also, for some administrations there were too few Blacks for an analysis. Thus, most of the reported analyses are based on the Chicano group. Even though there were sufficient numbers of Chicano applicants for an analysis of each administration, the numbers were small enough to affect adversely the ability of the statistical tests to detect differences. Therefore, the absence of a statistically significant difference does not mean there is no cultural bias--there may be a real difference, but not enough cases to detect it. To summarize this complicated but important logical point, if a statistically significant difference is observed, it would continue to be observed no matter how many additional observations were added to the analysis. On the other hand, the addition of more cases to an analysis in which no statistically significant difference was detected may (or may not, if no true difference exists) result in the detection of a statistically significant difference in the larger group. Note finally that "statistically significant" does not mean "socially significant"—two groups of 1000 men each may have a statistically significant difference in height of 1/4 inch which has no social significance whatsoever.

Applicants and Pass Rates

Shown in Table 1 are the number of applicants in each ethnic group, and their pass rates[3]. The most striking feature of Table 1 is the relatively small number of applicants who were not Anglo males. This would not be a problem if the applicant percentages were equal to the state population percentages for the various groups; however, this is not the

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[3]Because the exam can be repeated if failed, the number of applicants is actually the number of applications, which is greater than the number of individuals applying (at least once) over the seven administrations.

Table 1. Applicants and Pass Rates, by Group

	No. of Applicants	Percent of Total	Number Passing	Percent Passing
Anglo Males	2155	85	1675	78
Chicanos	98	4	58	59
Blacks	58	2	24	41
Women	239	9	191	80
Native Americans	7	0.3	5	71
Minority Women	22	0.9	12	55
Total*	2535	100	1941	77

*The entries in the table do not sum to the total because minority group women are entered in the row for their minority, in the row for women, and in their own row.

case. Based on the 1970 census for Colorado, the ratio of Chicanos to Anglos was .16; the applicant ratio was .04. Similarly, the population ratio of Blacks to Anglos is .04, but the applicant ratio was only .02. The magnitude of these discrepancies is best illustrated by considering how many additional minority applicants would be necessary to equate the population and applicant ratios. For Chicanos, approximately 345 additional applicants would be necessary, compared to the 98 actual applicants. For Blacks, approximately 53 additional applicants beyond the present 58 applicants would be needed. That is, if the number of Anglo applicants remained constant, the number of Chicano applicants should be increased 350% and the number of Blacks 90%. These percentages also indicate that Chicanos are much more under-represented in the applicant pool than are Blacks. There is no indication that this situation is improving over time. In fact, the number of Black applicants has decreased over the three years covered, while the number of Chicano applicants has changed little. Of course, the number of female applicants is also very small compared to the population percentage. However, the number of female applicants

in 1974 was double that in 1972 (see Table 2).

While the above results are probably not surprising to anyone familiar with this problem, their importance cannot be overemphasized. The large discrepancies in applicant percentages mean that the Colorado Bar exam is *not* the primary filter which is preventing minority group members from becoming lawyers; rather, the more important filter is the complex of cultural and educational institutions which determine who becomes an applicant for the exam. Thus, even if every minority applicant passed the exam, it would do little to correct the minority under-representation in the legal profession in Colorado. It is important not to lose sight of this fact in the following detailed analysis of the exam itself.

A second striking feature of Table 1 is the differential in passing rates for the ethnic groups. Over the seven administrations, the passing rates for both Chicanos and Blacks are significantly (statistically) lower than the rate for Anglo males. The pass rates for each group for each administration are presented in Table 2, and shown graphically in Figure 1. The stability of the Anglo pass rate is due in part to the fact that their pass rate is always based on a much larger number of cases. There is an insufficient number of cases for the various ethnic groups to do an administration-by-administration analysis of the pass rates, but the overall pass rate differences justify the more thorough analysis that follows.

Profile Analysis

The approach to cultural bias taken in this study is an attempt, by use of profile analysis, to identify particular essay subjects or MBE topics that are differentially difficult for members of minority groups. It is important to recognize that the technique of profile analysis cannot determine whether the test as a whole is culturally fair, but only if the pattern of individual topic scores is consistent with an interpretation of cultural fairness.

	Feb. 1972			July 1972			Feb. 1973			July 1973			Feb. 1974			July 1974			Feb. 1975		
	Applicants	# Passing	Percent	Applicants	# Passing	Percent	Applicants	# Passing	Percent	Applicants	# Passing	Percent	Applicants	# Passing	Percent	Applicants	# Passing	Percent	Applicants	# Passing	Percent
Anglo Males	234	184	76	384	267	70	297	203	68	419	392	94	244	165	68	353	288	82	215	176	82
Chicanos	8	5	63	15	8	53	12	5	42	20	16	80	11	2	18	19	14	74	13	8	62
Blacks	10	2	20	14	4	29	7	4	57	11	9	82	3	0	0.	8	2	25	5	3	60
Women	29	25	86	20	14	70	24	19	79	32	28	88	35	24	69	64	53	83	35	28	80
Native Americans	1	1	1.	1	1	1.	0	0	--	3	1	33	2	2	1.	0	0	--	0	0	--
Minority Women	1	1	1.	2	0	0.	4	1	25	6	5	83	3	1	33	5	3	60	1	1	1.
Total*	290	216	74	432	294	68	336	230	68	479	441	92	292	192	66	439	354	81	267	214	80

*The entries in the table do not sum to the total because minority group women are entered in the row for their minority, in the row for women, and in their own row.

Table 2. Applicants and Pass Rates, by Group by Administration

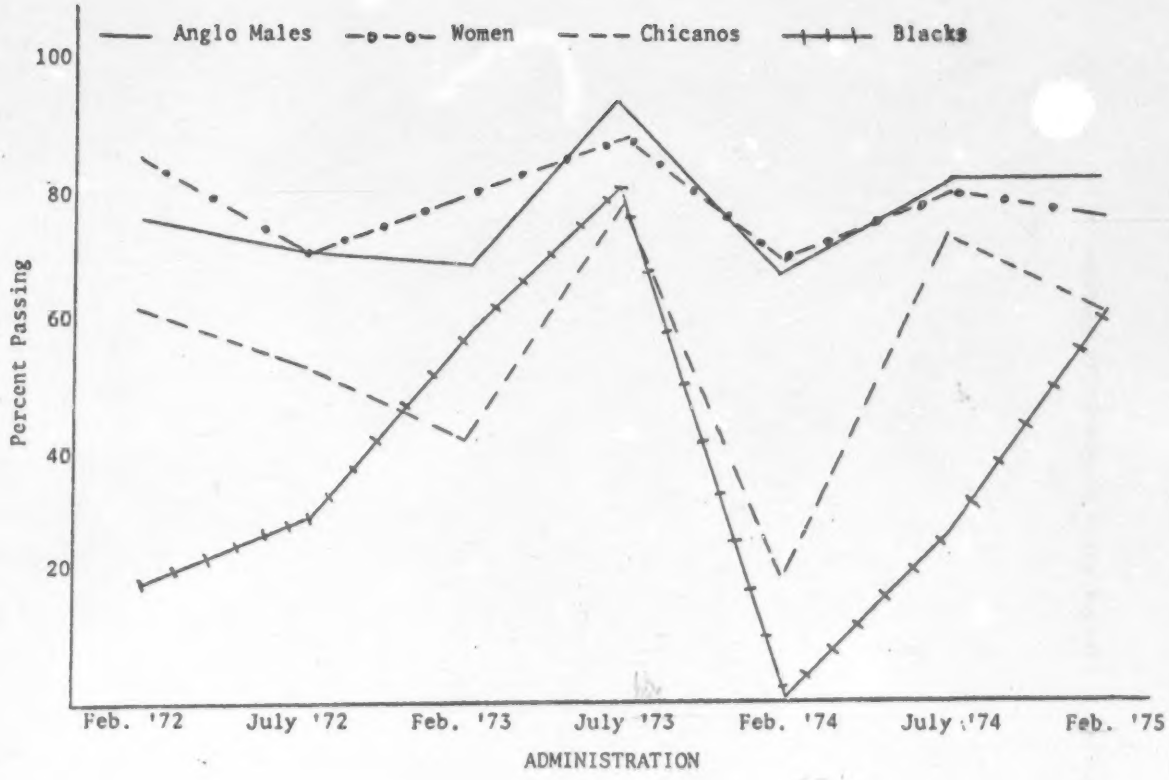

Figure 1. Passing Rates by Groups by Administration

Before examining the statistical results, a brief consideration of the logic of profile analysis is necessary. One can think of the pattern of the six individual essay scores or the five MBE scores as forming a profile for each applicant. These individual profiles can then be averaged to compute a profile for each group. Profile analysis is simply a technique for comparing such profile patterns across groups. If there is a general difference in exam performance for two groups, due to educational history, language style differences, or whatever, then that difference should be reflected equally on all subjects in a culturally fair exam. That is, the average score profiles for the two groups would have approximately the same shape, with a constant gap between them; a hypothetical example of this case is illustrated on the left of Figure 2. However, if a particular question is culturally biased in the sense that it emphasizes irrelevant weaknesses of one group and/or irrelevant strengths of the other group (that is, irrelevant to the competence the exam is designed to measure), then the difference in average scores for that question would be greater than for the other questions. In such a case, the average profiles would have the same shape except for the one biased question; this is illustrated on the right of Figure 2. As a technical note: this line of reasoning presumes that the scores from different topics are commensurate; that is, it is assumed that the same unit of measurement is used on all scales. In the present case, this is essentially equivalent to assuming that the ranges or variances of scores are equal across all topics within the essay and MBE portions. This is certainly the presumption of the scoring rules, which use a simple sum or average (as opposed to a weighted sum) to determine who passes the exam as a whole. Also, an examination of the actual ranges and variances of the set of scores and of the national sample as reported by ETS suggests that this assumption is quite reasonable in this case.

Figure 2. Hypothetical Profiles

In Figures 3a-3g are shown the Chicano and Anglo essay and MBE profiles for each administration. Statistical analysis reveals that there are statistically significant differences in profile shape for the essay questions for Anglo males and Chicanos for the three consecutive administrations of February 1972, July 1972, and February 1973. There are no profile shape differences on the essay questions for the most recent administrations. The significant essay profile shape differences do not follow the bias pattern illustrated in Figure 2: there are small differences throughout the profile rather than one particular offending topic. In addition, the pattern of differences is not consistent across administrations. For example, the greatest differences between Chicanos and Anglos on the February 1972 administration occurs on *Business Associations*, with Anglos doing much better; however, on the July 1972 exam *Business Associations* shows no gap between the two groups and on the February 1973 exam Chicanos do slightly better than Anglos on this topic. *Wills, Trusts, and Estates* has the same pattern. As a final example, Chicanos did much better than Anglos on *Public Law* in February 1972, but the reverse is true in July 1972. Thus, despite the profile differences, there is not a clear indication of cultural bias with respect to any specific essay subject.

The only statistically significant profile shape differences for the MBE are for the Chicanos and Blacks as a combined group versus the Anglo males

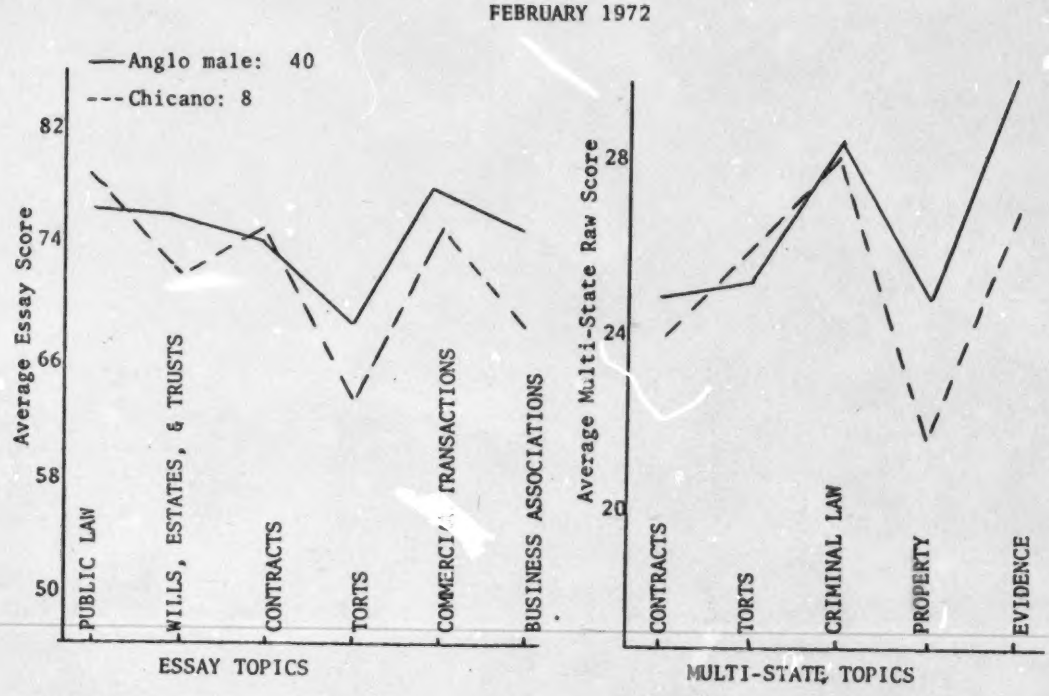

Figure 3a. Essay and MBE Profiles, February 1972

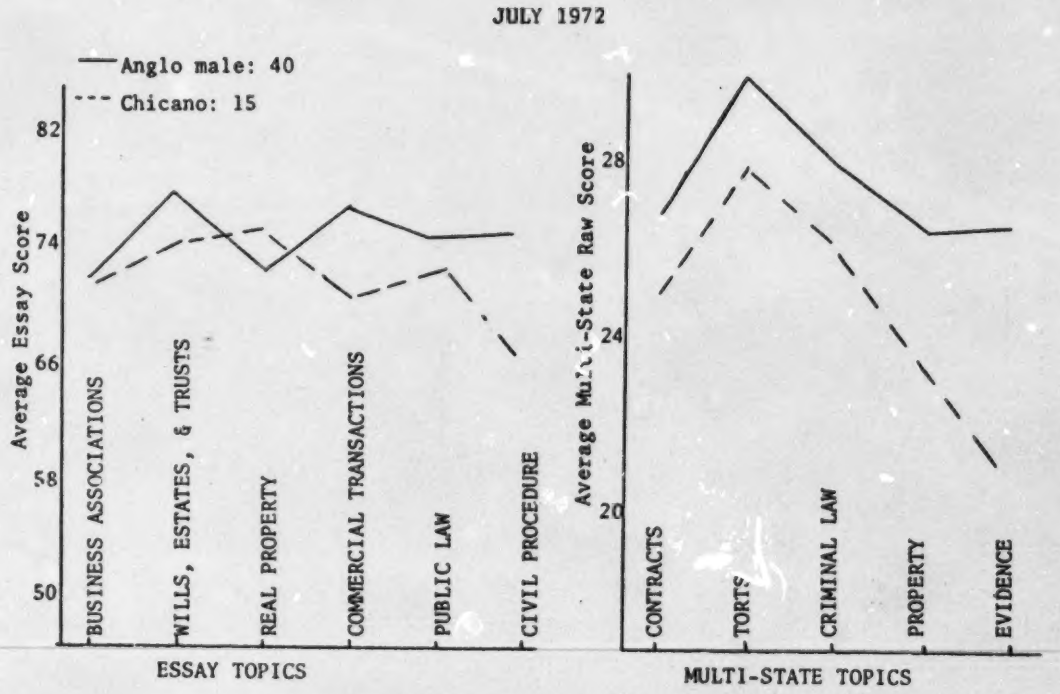

Figure 3b. Essay and MBE Profiles, July 1972

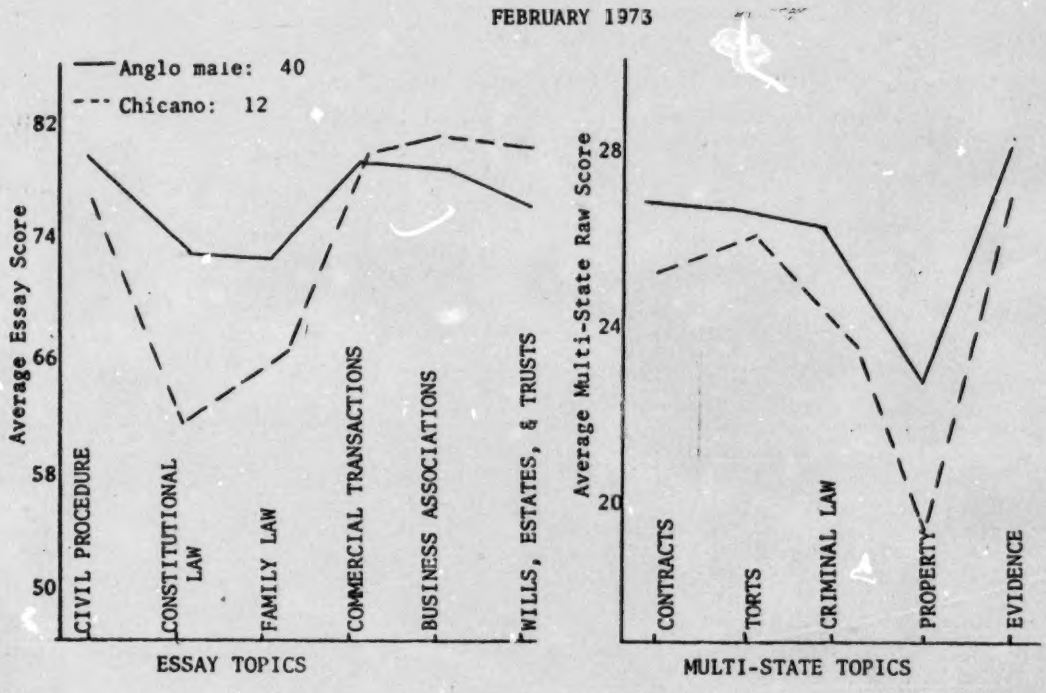

Figure 3c. Essay and MBE Profiles, February 1973

JULY 1973

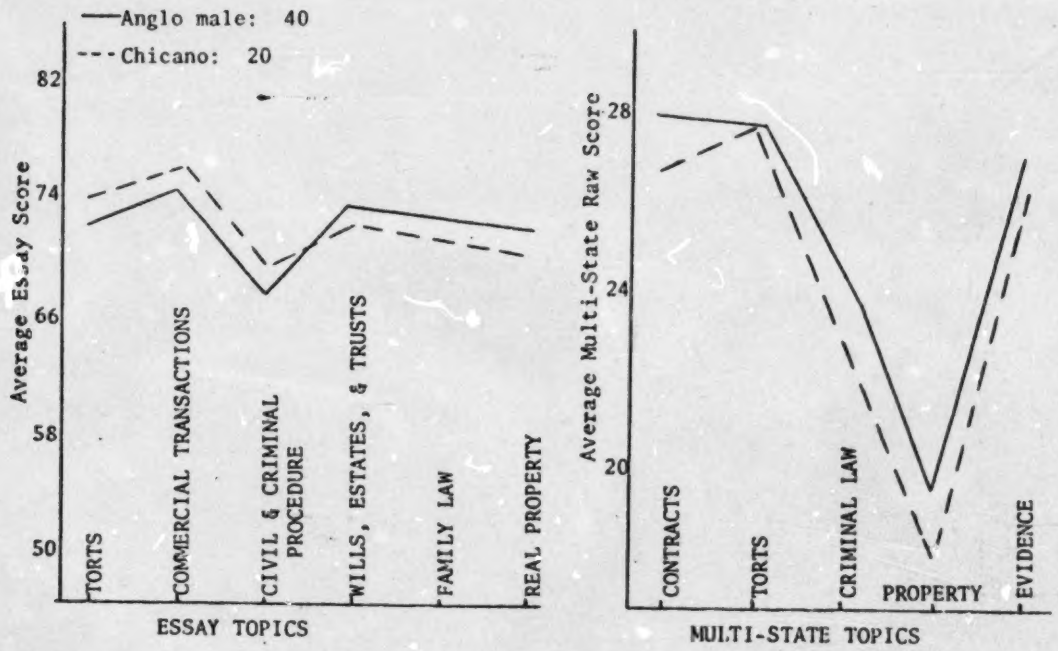

Figure 3d. Essay and MBE Profiles, July 1973

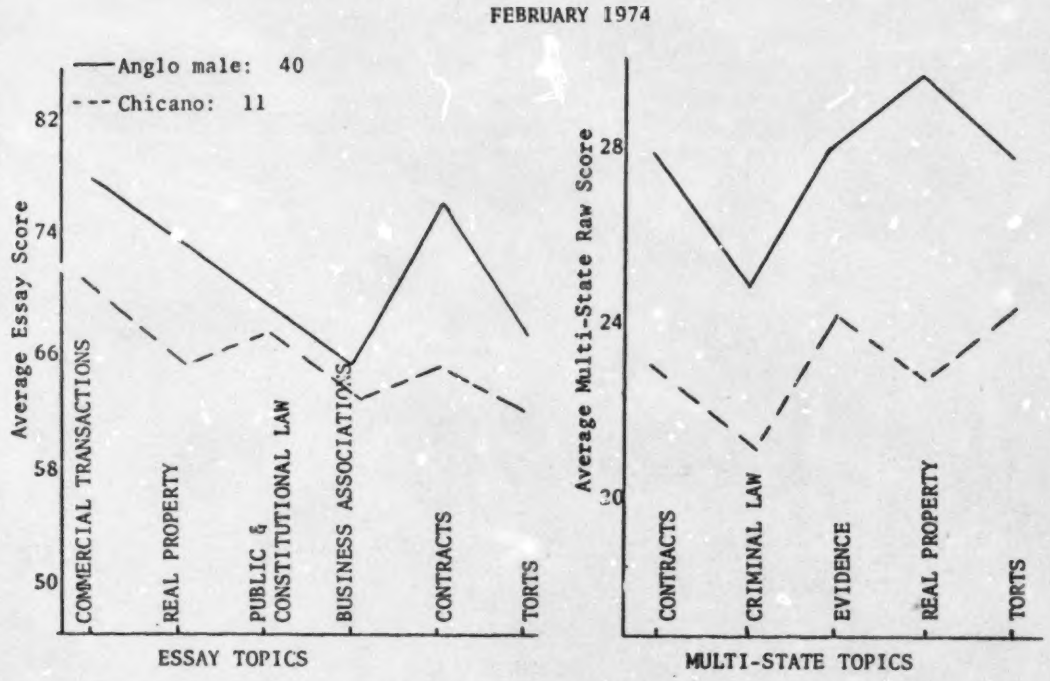

Figure 3e. Essay and MBE Profiles, February 1974

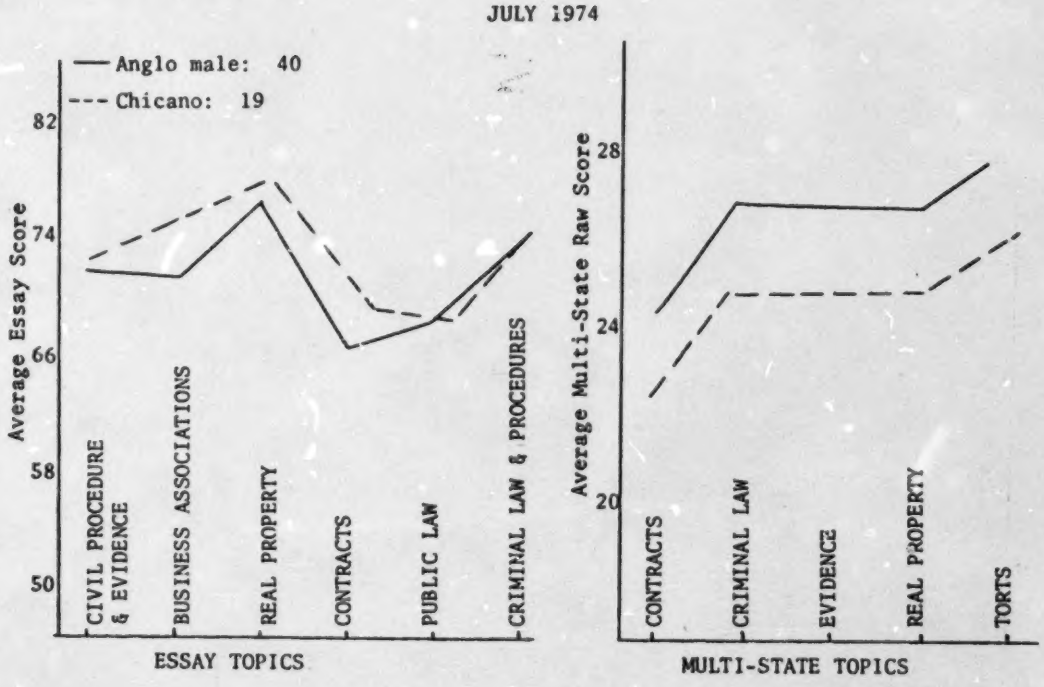

Figure 3f. Essay and MBE Profiles, July 1974

FEBRUARY 1975

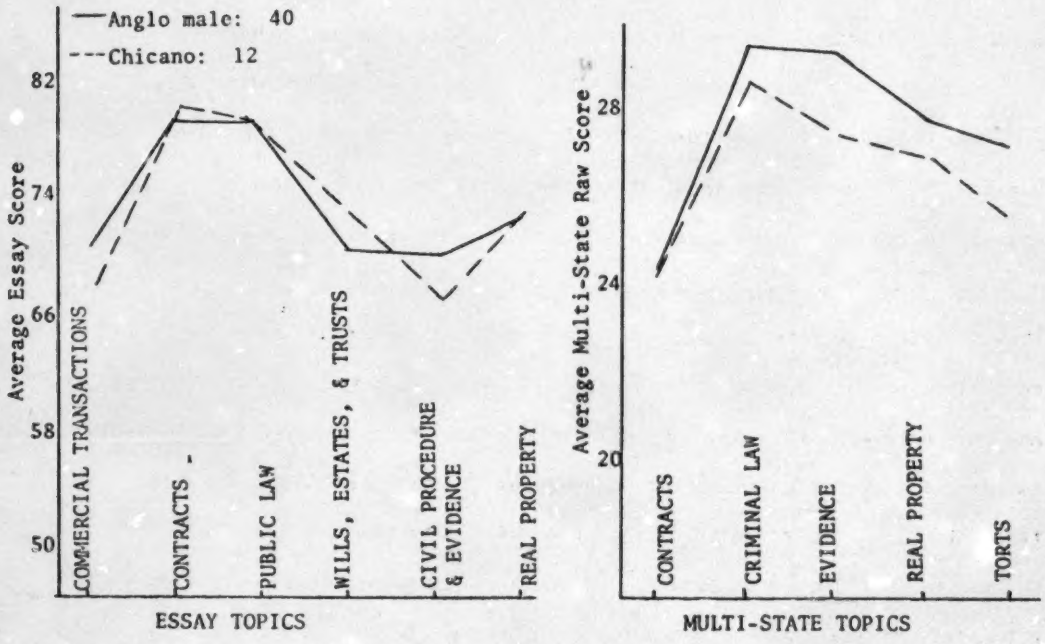

Figure 3g. Essay and MBE Profiles, February 1975

in July 1972 and February 1974. These differences are consistent across administrations, and therefore indicate potential cultural bias in the exam. The Anglo and Chicano MBE profiles for February 1974 show the bias pattern illustrated in Figure 2; the offending subject is *Property*. A similar pattern is found in July 1972, where again *Property* and also *Evidence* show a greater difference between Anglos and Chicanos than do the other subjects. While not statistically significant, the February 1972 and February 1973 profiles have a similar pattern, with *Property* and *Evidence* having the greatest differences between the two groups in February 1972 and *Property* having the greatest difference in February 1973. This consistent pattern in four of the seven administrations clearly demonstrates that the MBE *Property* questions (and to some extent the MBE *Evidence* questions) have been differentially difficult for Anglos and Chicanos, being relatively easier for Anglos. Note that this does not mean that *Property* was an easy question for Anglos: MBE *Property* scores for *both* groups are markedly below those for the other MBE subjects on the first three administrations. This was not unique to the Colorado applicants, since the national averages published by ETS also indicate a much lower average for *Property*. On the several administration when *Property* was also an essay question, neither a profile shape difference nor a marked difficulty difference relative to other questions is observed. This information suggests that the MBE *Property* subject has been abnormal in comparison to other MBE questions in both overall difficulty and in relative difficulty for Chicanos. However, this abnormality has not appeared in the last two administrations, so it is possible that ETS has been successful in making the *Property* questions more comparable to those for other topics.

Relationship between Essay and MBE Scores

If both the essay portion and the MBE multiple-choice portion are measures of the same legal competency, then the score for an individual on one portion should be matched by a similar score on the other portion. This similarity can be measured by a correlation coefficient, which has a maximum value of +1.0 when high scores on one test are matched by high scores on the other (with a similar matching for the low scores as well), a minimum value of -1.0 when high scores on one test indicate a low score on the other test, and an intermediate value of 0.0 when scores on one test have no relation to scores on the other test[4]. The correlation coefficient between the average essay score and the average MBE score varies between 0.55 and 0.69 over the seven administrations, which is very reasonable for this situation, although the relationship could be better. The correlations remain essentially the same when they are computed separately for each group for each administration.

Theoretically, the high correlation coefficients mean that both portions are measuring roughly the same ability. A more important practical consequence is that a poor score on one portion is generally matched by a poor score on the other portion. Note that the high correlations do *not* imply that the average scores on each portion are equal. That is, a good or poor score is defined by its position relative to the average score for the respective portion. In fact, the average scores are not equal--the MBE percentage scores are always lower than the average essay scores for each administration. This is

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[4]Technically, a coefficient of 0.0 only indicates the absence of a linear relationship and does not eliminate the possibility of a more complex curvilinear relationship. However, the text statement is appropriate for this analysis.

readily apparent from an examination of Table 3, which gives the average essay and MBE scores for each group for each administration. Since February 1974 a correction formula has been applied to the MBE scores to make them more comparable to the essay scores; these MBE "Equivalence Score" averages are also reported in Table 3.

Besides the fact that unadjusted MBE scores are always lower than the essay scores, there is another startling consistency in Table 3: the difference between essay and MBE scores is always greater for the Chicanos and Blacks than it is for Anglo males. For example, in July 1974 the difference between average essay and MBE E.S. scores is -1.2 for Anglo males but 0.8 for Blacks and 3.5 for Chicanos. The implications of such differences are examined in the remainder of this section.

It is possible to consider the essay and MBE scores for each group as a profile; then the technique and logic of profile analysis can be applied to the essay-MBE profiles. However, the use of the correction formula for MBE scores is a recognition of the fact that essay and MBE scores are generally not commensurate, but that the MBE equivalence and essay scores should be. Thus, profile analysis is strictly justifiable only for the last three administrations (those using the E.S. MBE). If the two tests are equally difficult for each ethnic group, then there should be a constant gap between the profiles. This is clearly not the case (see Figure 4): there are statistically significant profile shape differences for both administrations in 1974, with the gap between Anglo males and Chicanos being greater on the E.S. MBE than on the essay. A profile analysis of the four administrations using unadjusted MBE scores shows a statistically significant difference for July 1972, with all other administrations having the same pattern (although not quite statistically significant). Such differences for the first four administrations could be due wholly or in part to the lack of commensurability between MBE and essay scores, but the analysis below strongly suggests that they are at least in part due to a difference in

	Feb. 1972		July 1972		Feb. 1973		July 1973		Feb. 1974			July 1974			Feb. 1975		
	Essay	MBE	Essay	MBE	Essay	MBE	Essay	MBE	Essay	MBE	MBE Equiv.	Essay	MBE	MBE Equiv.	Essay	MBE	MBE
Anglo Males	75.2	67.1	75.5	69.5	76.7	65.6	72.2	63.1	71.7	69.1	71.3	71.5	66.6	72.7	74.2	69.0	75.
Women	77.2	67.0	75.0	68.2	80.2	63.7	75.8	64.5	72.3	67.6	69.9	74.3	67.3	73.2	76.3	68.5	74.
Blacks	69.3	58.4	71.7	63.5	74.5	60.8	73.2	58.7	62.2	54.8	57.0	68.3	59.3	67.5	71.8	63.5	70.
Chicanos	72.3	63.8	72.3	62.3	73.5	60.9	72.3	60.4	65.5	57.7	60.0	73.2	62.4	69.7	72.7	66.5	72.
Total	74.8	65.8	74.2	66.9	77.0	64.0	73.3	62.5	70.8	66.6	68.9	72.9	65.9	72.2	74.8	68.2	74

Table 3. Essay and MBE Averages, by Group by Adminis[illegible]on

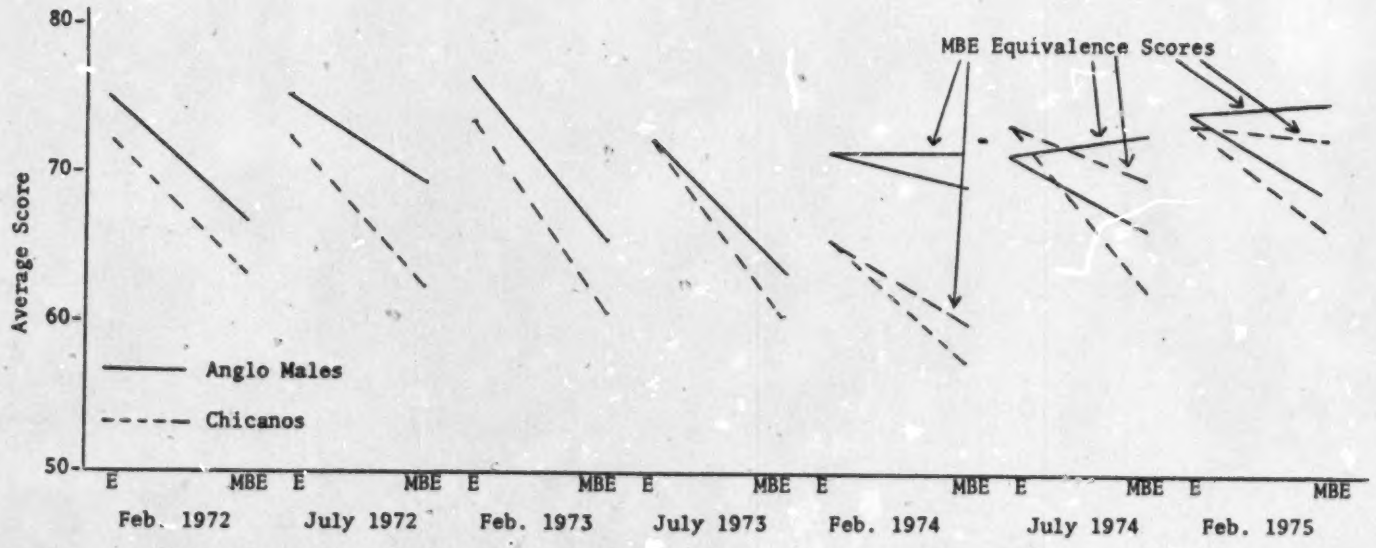

Figure 4. Essay and MBE Averages, by Group by Administration

in difficulty of the tests for Anglo males and Chicanos. That is, either the MBE is effectively biased against minorities *or* the essay portion is biased in favor of minorities, or both.

The consistency and practical import of this finding of likely bias calls for more detailed analysis using another statistical approach. The technique of linear regression may be used to construct a formula for predicting an applicant's MBE score on the basis of that individual's essay score. For example, the formula 26.5 + .57 X essay score makes a reasonably accurate[5] prediction of actual E.S. MBE score for the combined group of Anglo males and Chicanos for February 1974. The formula is constructed so that the average error of prediction is zero--for some cases the formula overestimates actual MBE scores while for others it underestimates. The question of bias becomes a question of whether the formula tends consistently to under- or overestimate the scores within each ethnic group. For the February 1974 administration, the formula *underestimates* the scores of Anglo males by an average of 1.81 points, and *overestimates* those of Chicanos by an average of 3.82. These differences between over- and underestimation are statistically significant on the same administrations for which there were significant profile shape differences, with the formulas for all seven administrations underestimating Anglo male MBE scores and overestimating Chicano scores. This means that if an Anglo male and a Chicano received the same essay score, then, *on the average*, the Chicano would receive a *lower* MBE score. Conversely, if an Anglo and a Chicano received the same MBE score, then, on the average, the Chicano would recieve a *higher* essay score.

Thus, there is no doubt statistically that either the MBE is biased against minorities or the essay portion is biased in favor of minorities, or both. This result is by far the most statistically reliable and important finding of this report. Unfortunately, it is not possible statistically to

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[5]It is reasonably accurate in the sense that the correlation coefficient between the formula's predictions and the actual scores is .60.

determine which portion is at fault without more information. However, it is possible to examine the implications of the scoring rules used for the last three administrations, which have used a formula to adjust MBE scores to make them comparable to the essay scores (*i.e.*, make the average MBE and essay scores more equal). The above results imply that a separate adjustment formula should have been used for each ethnic group. Due to the small numbers of minority applicants, it is not possible to do this in practice. However, the fact that the same adjustment formula was used for all applicants, combined with the above results, implies that the E.S. MBE formula had the effect of penalizing minority applicants. This is because the Anglo male unadjusted MBE scores are more comparable to the essay scores than are the Chicano scores, and therefore the Chicano MBE scores tend to be "under-adjusted" when the common formula is used. Note that the Chicanos would still be at a relative disadvantage on the MBE even if no correction formula were applied. Without all the scores for an administration (only a sample of 40 Anglo males was used for each administration in this analysis), it is impossible to determine accurately the size of the penalty, but the present sample of scores suggests that the penalty may be up to 5 or 6 percentage points for some administrations (namely, both administrations in 1974).

The discussion in the last paragraph is based on the fact that essay scores were used as a standard in the scoring formula and the adjustment was computed for the MBE scores. If instead an equivalence score had been computed for the essay scores using MBE scores as a standard, the effect would have been to penalize Anglo males relative to Chicanos. Again, it should be emphasized that without external criterion information, it is impossible to say whether essay or MBE scores should be used as the standard.

These results are relevant to an interesting potential source of bias against minorities--the subjective grading of essay questions. It has been suggested that minorities might receive lower essay scores than Anglos of

equal ability because of differences in language style or even in basic values between minority applicants and essay graders. The above findings conclusively demonstrate that such is not the case for this exam. Rather, either the objectively graded MBE is biased against minorities, or the subjectively graded essay potion is biased in favor of minorities.

Passing Rules and Their Application

While the form of the Bar examination has remained constant over the last seven administrations (six essay questions and five MBE subjects), the rules applied to the scores to determine who passes have varied considerably. Passing rules for the first several administrations specify that to pass the exam, an applicant must pass a fixed number of essay and MBE subjects (*e.g.* to pass the essay portion, one must pass with a score of 75 or better 5 of 6 individual subjects, or 4 of 6 subjects with a combined sum of at least 450). The Educational Testing Service advises that individual MBE subject scores are not sufficiently reliable to justify pass-fail decisions on each subject. Likewise, the individual essay questions are unlikely to be sufficiently reliable to make such decisions. Since the sum of several different imperfect measures of the same ability will in general be a more reliable estimate of that ability than any of the individual measures, a more psychometrically justifiable procedure is to base the passing rules on the sum (or average) for each portion, or even to average the two portions. This more justifiable procedure has in fact been used in the passing rules for the most recent administrations.

It is also interesting to note that the passing rules have not been rigorously followed: slightly more applicants have passed than should have according to the stated rules. For example, in February 1973 only two Chicanos passed according to a rigid application of the rules to the scores

provided by the Supreme Court, yet the names of five Chicanos appear on the published pass list. Similarly, only one Black passed that administration according to the published rules, but four Blacks are on the pass list. Probably more Anglo males passed that administration than should have also, but this could not be determined since only a sample of 40 of the Anglo males was examined in this study. Similar discrepancies occur for both administrations in 1972. While impossible to determine exactly, it appears likely that these discrepancies resulted from considering only total scores rather than the number of individual subjects passed. Thus, the actual rules used may have been more appropriate psychometrically than the published rules, and the result was to allow more people to pass.

Notes and Comments on Related Issues

Little mention of the results for women is made in the above analysis, because women as a group do neither statistically better nor worse than Anglo males in terms of either pass rates or average scores. There are also no profile shape differences for women versus Anglo males for any administration. As noted earlier, the only real difference for women is the relatively small but increasing number of applicants.

Unfortunately, there were too few Blacks and Native Americans for any one administration to do a reasonable statistical analysis. Thus, except for the comments above about passing rates and under-representation of Blacks, not much can be said statistically about the performance of Blacks or Native Americans, or whether the examination is biased against either group. However, while not usually statistically significant, the pattern of results for Blacks is similar to that for Chicanos reported above.

It has been suggested that because of career goals and interests minorities do not do well on questions dealing with business and commerce.

With the exception of MBE *Property* discussed above, there is no evidence to support this suggestion. Rather, subjects such as *Commercial Transactions* and *Wills, Estates, and Trusts* are just as likely to be good subjects as bad for Chicanos *and* Anglos. Thus, eliminating such questions from the Bar examination would have little effect on the overall minority pass rates relative to Anglo males.

Besides the acknowledgements above to those who made access to the scores possible, appreciation is also due to Dr. Greg Jackson and Dr. Lou McClelland who made several suggestions which substantively improved this report. Of course, the responsibility for the use of those suggestions remains with the author.

Appendix B

UNITED STATES COMMISSION ON CIVIL RIGHTS

Washington, D. C. 20425

DATE: September 30, 1975

REPLY TO ATTN OF: OR

SUBJECT: Comments on "Statistical Analysis of the Colorado Bar Examination - February 1972 to February 1975" by Gary McClelland

TO: Gay Beattie, Chairperson
Colorado State Advisory Committee

My comments will be divided into three parts, enumeration of the report's findings with which I concur, cautions about a few of the conclusions which I think are not fully substantiated by the data and analyses, and discussion of an important question which could not be studied because of inadequate data.

The report provides good data and analyses to justify the following findings:

1) Minority applicants have a lower rate of passing the Colorado Bar exam than do Anglo males.

2) The claim that Chicanos do relatively worse on business related essay questions than on other questions is not supported by the data for the last three year period, taken as a whole.

3) The largest differences between Anglo's and Chicano's scores are on the MBE property and evidence questions.

4) Partly due to (3) above, there is a bigger difference in Anglos' and Chicanos' scores on the whole MBE than on the whole essay test.

Dr. McClelland concludes from the fourth finding that, "Thus, there is no doubt statistically that either the MBE is biased against minorities or the essay portion is biased in favor of minorities, or both [p. 23]." He indicates that this conclusion is predicated on the assumption, "If both the essay portion and the MBE multiple-choice portion are measures of the same legal competancy... [p. 19]." That assumption does appear to have been made by the Colorado Bar and the developer of the MBE test. It should be noted, however, that there is evidence to suggest that the assumption is not entirely true. The Colorado Bar essay test covers a broader range of topics than does the MBE; testing experts generally recognize that essay tests tap somewhat different cognitive

skills than do multipe-choice tests; and Dr. McClelland found that scores on the two tests had a correlation between 0.55 and 0.69, which is considered only moderate and moderately high, respectively, for two well developed tests. If the assumption is not correct, then Dr. McClelland's above quoted conclusion need not be correct.

When discussing a related point Dr. McClelland says the data imply that the equivalence score correction to the MBE test scores "had the effect of penalizing minority applicants /p. 247." This statement is correct only if the essay and MBE tests do measure the same legal skills and if the essay tests is a more accurate measure of Chicano's legal skills than is the MBE. There is not, however, clear proof in the report that either of these conditions prevail.

Because of the points made in the above two paragraphs, I think there is no conclusive evidence in the report showing that the MBE is culturally biased against Chicanos. The evidence only weakly suggests such a bias.

It should be noted, however that the MBE is a multiple-choice test, and with all other things equal, an essay test usually will be better than a multiple-choice test for measuring legal job skills which involve the writing of briefs and the construction of oral arguments. This is because these job skills require the creation of responses rather than the selection of a correct response from a set of four given ones. All other things may not be equal, but unless there is evidence to this effect, the most reasonable assumption is that the essay test is the more valid of the two.

To put Dr. McClelland's report in proper perspective I think it is desirable to reiterate a point which he made early in the report but which might tend to be forgotten. That point is the Dr. McClelland was not able to study the question of whether the Colorado Bar exam, taken as a whole, is a culturally fair test for admission to the practice of law in Colorado. Such a study requires data from a sample of persons who have taken the test and had their job performance as lawyers accurately evaluated; no such data presently exist. It should also be noted that the lack of job performance data not only precludes clear assessment of the cultural bias in the Colorado Bar exam, but it also precludes clear assessment of the job relevancy of the exam. In addition, the fact that there is not job performance data available does not preclude that some reasonably good data could be assembled, with some time and effort, if the Bar chose to seek such data.

GREGG JACKSON, Ph.D.
Office of Research